

**Bond University**

## **DOCTORAL THESIS**

### **Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia**

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**PUBLIC POLICY IN THE JUDICIAL ENFORCEMENT OF  
ARBITRAL AWARDS:  
LESSONS FOR AND FROM AUSTRALIA**

**Winnie (Jo-Mei) Ma**

A thesis submitted to Bond University in fulfillment of the requirements  
for the Degree of Doctor of Legal Science (SJD).

**December 2005**

## **CERTIFICATE**

This thesis is submitted to Bond University in fulfillment of the requirements for the Degree of Doctor of Legal Science (SJD).

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at Bond University or any other institution, except where due acknowledgement is made.

Winnie (Jo-Mei) Ma

14 December 2005

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May 2006

Winnie (Jo-Mei) Ma

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## THESIS ABSTRACT

### **Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons For and From Australia**

Judicial enforcement of arbitral awards is necessary where there is no voluntary compliance by the relevant parties. Courts world-wide may refuse to enforce arbitral awards if such enforcement would be contrary to the public policy of their countries. This is known as ‘the public policy exception to the enforcement of arbitral awards’. It is enshrined in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (*New York Convention*)<sup>1</sup> and the UNCITRAL Model Law on International Commercial Arbitration 1985 (*Model Law*),<sup>2</sup> which are two of the most prominent international instruments in promoting and regulating international commercial arbitration.

The public policy exception is one of the most controversial exceptions to the enforcement of arbitral awards, causing judicial inconsistency and therefore unpredictability in its application. It is often likened to an ‘unruly horse’, which may lead us from sound law.<sup>3</sup>

The International Law Association’s Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002 (*ILA Resolution*)<sup>4</sup> endorses a narrow approach to the public policy exception – namely, refusal of enforcement under the public policy exception in exceptional circumstances only. The ILA Resolution seeks to facilitate the finality of arbitral awards in accordance with the New York Convention’s primary goal of facilitating the enforcement of arbitral awards. The courts of many countries refer to this as the New York Convention’s ‘pro-enforcement policy’, which demands a narrow approach to the public policy exception.

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<sup>1</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

<sup>2</sup> *Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on 21 June 1985, UN Doc A/40/17.

<sup>3</sup> *Richardson v Mellish* [1824-34] All ER 258, 266 (Burrough J).

<sup>4</sup> *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, adopted at the International Law Association’s 70<sup>th</sup> Conference held in New Delhi, India, 2-6 April 2002.

This thesis explores the main controversies and complexities in the judicial application of the public policy exception from an Australian perspective. It is a critical analysis of the prevalent narrow approach to the public policy exception. It examines the extent of the ILA Resolution's suitability and applicability in Australia, considering past problems experienced by the courts of other countries, the distinctive features of the Australian legal system, and future challenges confronting the Australian judiciary. It examines when and how the Australian judiciary may need to swim against the tide by departing from the narrow approach to the public policy exception. For instance, such departure may be appropriate for ensuring that their application of the public policy exception neither causes nor condones injustice, and thereby preserves the integrity and faith in the system of arbitration.

The author's perspective throughout this thesis is that of an academic lawyer, as she has not had the benefit of practical experience in this area of the law.

The recommendations throughout this thesis are tailor-made for the Australian judiciary. They are Australian in perspective yet international in character. They canvass certain issues not addressed in the ILA Resolution, encouraging the Australian judiciary to participate in the ongoing debate and the ultimate resolution of those issues. In doing so, this thesis contributes to refining the judicial application of public policy in determining the enforceability of arbitral awards.

The public policy exception to the enforcement of arbitral awards, or its application, need not be an unruly horse in Australia.

The law is stated as known to me on 31 August 2005.

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## ABBREVIATIONS

Annulment exception	New York Convention Art V(1)(e); Model Law Art 36(1)(a)(v); IAA s 8(5)(f)
Arbitrability exception	New York Convention Art V(2)(a); Model Law Art 36(1)(b)(i); IAA s 8(7)(a)
CAA	Commercial Arbitration Act 1990 (Qld)
CIETAC	China International Economic and Trade Arbitration Commission
CLOUT	Case Law on UNCITRAL Texts
Due process exception	New York Convention Art V(1)(b); Model Law Art 36(1)(a)(ii); IAA s 8(5)(b)
ECJ	European Court of Justice
EC Treaty	Treaty Establishing the European Community 1957
EU	European Union
Enforcement provisions	New York Convention Arts IV-V; Model Law Arts 35-36; IAA ss 8-9
FJA	Foreign Judgments Act 1991 (Cth)
IAA	International Arbitration Act 1974 (Cth)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ILA	International Law Association
ILA Final Report	‘Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) <i>Arbitration International</i> 249

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ILA Interim Report	‘Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19(2) <i>Arbitration International</i> 217
ILA Resolution	Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Non-enforcement provisions	New York Convention Art V; Model Law Art 36; IAA ss 8(5) and (7)
Public policy exception	New York Convention Art V(2)(b); Model Law Art 36(1)(b)(ii); IAA s 8(7)(b)
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
WTO	World Trade Organisation

## INTRODUCTION

Public policy can be a ‘double-edged sword’ in international commercial arbitration – ‘helpful as a tool, dangerous as a weapon’.<sup>5</sup> Judicial perceptions of public policy have changed from time to time. According to the rather pessimistic English view in the 1820s:

“[Public policy is] a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.”<sup>6</sup>

Optimistic views emerged 150 years later:

“With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.”<sup>7</sup>

Judicial perceptions of arbitration have also changed, especially since the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (*New York Convention*)<sup>8</sup> and the UNCITRAL Model Law on International Commercial Arbitration 1985 (*Model Law*).<sup>9</sup> For instance, the US courts have expressed the necessity to ‘shake off the old judicial hostility to arbitration’, and to subordinate parochial concerns to ‘the international policy favouring commercial arbitration’.<sup>10</sup>

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<sup>5</sup> Loukas Mistelis, ‘Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards’ (2000) 2 *International Law Forum Du Droit International* 248, 248.

<sup>6</sup> *Richardson v Mellish* [1824-34] All ER 258, 266 (Burrough J).

<sup>7</sup> *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, 606-607 (Lord Denning MR).

Similarly, according to Justice G N Williams, ‘Importance of Public Policy Considerations in Judicial Decision-Making’ (2000) *International Legal Practitioner* 134, 134: “If Burrough J thought in 1824 he was putting an end to the significance of the notion of ‘public policy’ in the development of the common law then he was sadly mistaken.”

<sup>8</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1989).

<sup>9</sup> *Model Law on International Commercial Arbitration*, UN Doc A/40/17, adopted by the United Nations Commission on International Trade Law on 21 June 1985 and recommended by the United Nations General Assembly to Member States on 11 December 1985.

<sup>10</sup> *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 638-639 and 661 (1985).

Similarly, according to *Qantas Airways Ltd v Dillingham Corp* [1985] 4 NSWLR 113, 118 (Rogers J): “The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created.”

Enforcement by proceedings in a national court is ‘the ultimate sanction’ against the recalcitrant party for non-compliance with an award.<sup>11</sup> It is a process whereby ‘a private act is being empowered by a public act’.<sup>12</sup> In this context, public policy has been regarded as one of the most significant and controversial bases for refusing the enforcement of arbitral awards.<sup>13</sup>

The changing perceptions of both public policy and arbitration have shaped the judicial approach to public policy as a legal basis for rendering arbitral awards unenforceable, and even invalid. This is known as the public policy exception to the enforcement of arbitral awards, or the public policy ground for non-enforcement of arbitral awards, abbreviated as ‘the public policy exception’ in this thesis.<sup>14</sup> The public policy exception ‘caused the most consternation’ among the drafters of the New York Convention, as it was considered both a ‘safety valve’ and ‘major potential loophole’.<sup>15</sup>

Many national courts acknowledge that the ‘pro-enforcement policy’ of the New York Convention requires a narrow approach to the public policy exception. The ‘pro-enforcement policy’ seeks to uphold the finality and enforceability of arbitral awards. It presumes arbitral awards to be enforceable as a general rule, subject to the specified exceptions to enforcement (including the public policy exception), which should be interpreted narrowly and strictly against non-enforcement. This attitude or approach is known as the ‘narrow approach’ to the public policy exception. For instance, some national courts would refuse enforcement only where such enforcement would violate ‘the most basic notions of morality and justice’,<sup>16</sup> or ‘be clearly injurious to the public

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<sup>11</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (first published 1986, 4<sup>th</sup> ed, 2004) 513.

<sup>12</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003), 689 para 26-6.

<sup>13</sup> See, eg, Gary Born, *International Commercial Arbitration* (2<sup>nd</sup> ed, 2001) 815.

<sup>14</sup> The ‘public policy exception’ is embodied in Art V(2)(b) of the New York Convention, and includes the mirroring provisions in Art 36 (1)(b)(ii) of the Model Law and s 8(7)(b) of Australia’s *International Arbitration Act 1974* (Cth). See section 6 of this Introduction (Terminology – ‘The public policy exception’).

<sup>15</sup> David Stewart, ‘National Enforcement of Arbitral Awards Under Treaties and Conventions’ in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994) 189.

<sup>16</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l’Industrie du Papier*, 508 F 2d 969, 973-974 (2<sup>nd</sup> Cir, 1974).

good'.<sup>17</sup>

Continuing inconsistencies in the judicial approach to the public policy exception have nevertheless encouraged reliance on this exception to resist or delay enforcement of arbitral awards.<sup>18</sup> They have also encouraged 'enforcement shopping',<sup>19</sup> as more people become aware that the outcome of a public policy challenge may differ depending on the place of enforcement. Consequently in April 2002, the International Law Association adopted the Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards (*ILA Resolution*).<sup>20</sup> This recent endeavour confirms and clarifies 'international public policy' as the applicable test for determining the enforceability of foreign arbitral awards under the public policy exception.<sup>21</sup> 'International public policy' remains the prevailing test as it is commonly perceived as narrower than 'domestic public policy' and more appropriate than 'transnational public policy'.<sup>22</sup>

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<sup>17</sup> *Deutsche Schachtbau und Tiefbohrgesellschaft mbH v R'as Al Khaimah National Oil Co & Shell International Petroleum Co Ltd* [1987] 2 Lloyd's Rep 246, 254 (*DST v Rakoil*).

<sup>18</sup> Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 249, 255 (*ILA Final Report*).

<sup>19</sup> Albert van den Berg, 'Annulment of Awards in International Arbitration' in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994) 160.

<sup>20</sup> *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, adopted at the International Law Association's 70<sup>th</sup> Conference held in New Delhi, India, 2-6 April 2002. The ILA Resolution is the culmination of a six year study of public policy by the International Law Association Committee on International Commercial Arbitration. It is appended to this thesis – see Appendix 1.

The two reports on the ILA Resolution are the *ILA Interim Report* (Audley Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 217), and *ILA Final Report* (Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 249).

<sup>21</sup> While resolutions of the ILA are non-binding legal instruments under international law, however in practice, the ILA's work is 'highly regarded and generally reflects the opinions of leading international arbitration scholars': R Fathallah, 'International Law Association Resolution on the Application of Public Policy as a Ground for Challenging Arbitral Awards' (2003) 16(2) *White & Case International Dispute Resolution* 3, 3. Consequently, resolutions of the ILA are a source of international law pursuant to Art 38(1)(d) of the *Statute of the International Court of Justice* 1945.

<sup>22</sup> See the relevant definitions in section 5(a) of this Introduction (Terminology – 'Categories of public policy'). Chapter 3 further explores these categories of public policy.

Yet public policy issues in international commercial arbitration remain controversial, some of which are designated as topics for UNCITRAL's future work.<sup>23</sup>

Being a Contracting State of the New York Convention, as well as 'a centre for international arbitration in the Asia/Pacific area',<sup>24</sup> Australia will continue to participate in the debate on the appropriate scope and application of the public policy exception. Australian courts can learn from the approaches and experiences of other courts. They also have much to offer. They need to anticipate future challenges in this area of law and, where necessary, formulate their own approach to the public policy exception in the *International Commercial Arbitration Act 1974 (Cth) (IAA)*,<sup>25</sup> which implements the New York Convention and adopts the Model Law.<sup>26</sup>

Through a critical analysis of the narrow approach to the public policy exception and the ILA Resolution, this thesis makes recommendations to the Australian judiciary on the main issues in the application of the public policy exception in determining the enforceability of foreign arbitral awards in Australia.

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<sup>23</sup> After holding a special commemoration of the New York Convention's 40<sup>th</sup> anniversary in June 1998, the UNCITRAL Working Group on Arbitration has adopted several topics for its future work. These include the residual discretionary power to grant enforcement notwithstanding the existence of an exception to enforcement, as well as the enforcement of awards which have been annulled or set aside: see *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999); *Report of the Working Group on Arbitration on the Work of its 32<sup>nd</sup> Session*, UN GA, 33<sup>rd</sup> session, UN Doc A/CN.9/468 (10 April 2000).

In addition, the drafting of provisions on recognition and enforcement of interim measures of protection (Draft Art 17 bis of the Model Law) reveals continuing debate on the meaning and scope of the public policy exception in this context: see eg, *Report of the Working Group on Arbitration on the Work of its 39<sup>th</sup> Session*, UN GA, 37<sup>th</sup> session, UN Doc A/CN.9/545 (8 December 2003); *Report of the Working Group on Arbitration on the Work of its 40<sup>th</sup> Session*, UN GA, 37<sup>th</sup> session, UN Doc A/CN.9/547 (16 April 2004).

<sup>24</sup> Michael Pryles, 'Australia', ICCA Handbook, <<http://www.kluwerarbitration.com>> at 27 July 2004.

<sup>25</sup> See *International Arbitration Act 1974 (Cth)* s 8(7)(b), as outlined in section 6 of this Introduction (Terminology – 'The public policy exception').

<sup>26</sup> Chapter 1 section 1.2 outlines the Australian law on the enforcement of arbitral awards.

## THESIS STATEMENT

There is a ‘public policy paradox’ in the New York Convention – namely, both the pro-enforcement policy and the public policy exception to enforcement are paradoxically based on public policy.<sup>27</sup> This has created the perception that the public policy exception and the pro-enforcement policy are competing public policies serving competing interests. The courts of many countries have resolved this apparent conflict by deferring to the pro-enforcement policy, usually without exploring whether there is indeed a conflict between these public policies, and without appreciating that the public policy exception is an exception to the pro-enforcement policy.

In spite of this apparent public policy paradox, the prevention and sanction of injustice in arbitration are the overriding objectives of both the public policy exception and the pro-enforcement policy. The public policy exception refuses to enforce unjust awards while the pro-enforcement policy does not extend to the enforcement of unjust awards. ‘Injustice’ includes, on the one hand, unfairness to one party or undue enrichment of one party at the expense of the other party (ie private injustice); and on the other hand, undue impairment of the legitimate interests of third parties or the public at large (ie public injustice).

Accordingly, the Australian judiciary may need to depart from the narrow approach to the public policy exception in certain circumstances, lest arbitral finality and party autonomy be upheld at the expense of justice or public confidence in the system of arbitration.

Furthermore, the infamous ‘unruly horse’ metaphor warns that an unruly application of the inherently unruly public policy exception may lead to unruly and even unjust consequences.

This thesis recommends the Australian judiciary to consider (or re-consider) the following:

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<sup>27</sup> See Andrew Rogers, ‘The Enforcement of Awards Nullified in the Country of Origin’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 549: “the principle of enforcement is itself the child of public policy, an exception exists where, to enforce... would itself be contrary to public policy.”

See also Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 542: “this pro-enforcement bias is itself considered a matter of public policy.”

- (a) the current perception of the New York Convention's public policy paradox, particularly the need to reorient it, which may involve re-balancing competing interests in international commercial arbitration;
- (b) the current characterisation and categorisation of public policy as domestic, international, multinational and transnational, particularly the need to re-express the concept of 'international public policy', as well as to re-define the scope of the public policy exception;
- (c) the interaction between public policy and mandatory rules, including the need to delimit the sources of public policy;
- (d) the interaction between the public policy exception and other exceptions to the enforcement of arbitral awards, including the possible concurrent application of these exceptions;
- (e) the criteria for exercising the judicial discretion to refuse or allow enforcement under the public policy exception;
- (f) the circumstances for considering the public policy exception on the court's own motion;
- (g) the appropriateness of adopting the same approach to the public policy exception in both enforcement and annulment proceedings; and
- (h) the criteria for determining the enforceability of annulled awards under the public policy exception.

Despite the judicial propensity in other countries to enforce foreign arbitral awards, Australian courts should deny enforcement where necessary or appropriate. For instance, where enforcement would cause or condone injustice so as to undermine the integrity of arbitration. The unruly horse of public policy can, and must, 'come down on the side of justice'.<sup>28</sup>

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<sup>28</sup> *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, 607 (Lord Denning MR).



## TERMINOLOGY

For the purposes of consistency and convenience, the following defined terms will be used throughout this thesis.

### 1 International commercial arbitration & foreign arbitral awards

This thesis uses the following terms interchangeably, unless otherwise indicated:

- ‘arbitration’, ‘international arbitration’ and ‘international commercial arbitration’;
- ‘award(s)’, ‘arbitral award(s)’ and ‘foreign arbitral award(s)’.

‘Arbitral awards’ include awards made by arbitrators appointed by the parties, as well as by arbitral tribunals chosen by the parties.<sup>29</sup>

‘International’ means that the relevant arbitration involves a foreign element.<sup>30</sup> ‘Foreign element’ arises where the parties’ residence and place of business, the subject-matter of their arbitration agreement or dispute involve different countries.<sup>31</sup> A foreign element is material or significant if it can result in the parties’ submission to the courts of another country, or the application of the laws of another country.

In the context of arbitral awards, the word ‘foreign’ has a narrower meaning even though it is often used synonymously with the word ‘international’ in other contexts. There are at least three definitions or categories of ‘foreign awards’.

- The first and widest definition encompasses any award with or involving foreign element. Here the terms ‘foreign awards’, ‘international awards’ and ‘non-domestic awards’ are used interchangeably, and in contradistinction to ‘(purely) domestic awards’. All of these awards may be made and sought to be enforced in the same country – the distinction lies in the presence and absence of foreign elements.<sup>32</sup>

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<sup>29</sup> See New York Convention Art 1(2) and IAA s 3.

<sup>30</sup> The ILA defines ‘international arbitral awards’ as awards ‘which are not strictly domestic and which include a material foreign element’: ILA Final Report 250.

<sup>31</sup> See Model Law Art 1(3).

<sup>32</sup> This is akin to the approach in Model Law Art I(3).

The New York Convention also applies to ‘awards not considered as domestic awards in the State where their recognition and enforcement are sought’ – this is known as the ‘functional criterion’ in Art I(1). For

- The second and narrower definition is confined to awards made and sought to be enforced in different countries.<sup>33</sup>
- The third and even narrower definition is found in Australia's IAA s 3(1), which means awards made and sought to be enforced in different 'Convention countries' (ie countries that are Contracting States of the New York Convention).<sup>34</sup> Accordingly, this category of foreign awards is also known as 'Convention awards'.<sup>35</sup> In Australia, a foreign award is an award made in a Convention country other than Australia.

This thesis primarily uses the second definition of foreign awards, and utilises the third definition when its discussions are specific to the Australian context or perspective.

On the other hand, the word 'commercial' has a wide meaning – it covers 'matters arising from all relationships of a commercial nature, whether contractual or not'.<sup>36</sup> This would exclude political, territorial or diplomatic disputes between sovereign nations, or between nations and individuals'.<sup>37</sup>

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instance, the New York Convention can apply to an award made by a permanent international arbitral institution situated within the territory of the enforcement State if that enforcement State does not regard it as a domestic award: see John Mo, *International Commercial Law* (3<sup>rd</sup> ed, 2003) 723 para 12.85.

<sup>33</sup> This is known as the 'territorial criterion' in New York Convention Art I(1), which refers to 'awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought'.

<sup>34</sup> See IAA s 3(1) definitions of 'foreign award' and 'Convention country'. This is effectively a reciprocity reservation or declaration under New York Convention Art I(3) – ie Australia 'will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State'.

<sup>35</sup> However, note the wider definition of 'Convention awards' – ie awards which fall within the scope of the New York Convention by virtue of either the territorial criterion or the functional criterion in New York Convention Art I(1).

<sup>36</sup> The footnote to Model Law Art 1(1) provides examples such as trade transactions for the supply or exchange of goods or services, agency, leasing, licensing, construction of works, financing, banking, insurance, joint venture and other forms of business co-operation.

According to the Explanatory Note on the Model Law (UN Doc A/40/171) para 11, this list emphasises 'the width of the suggested interpretation' and indicates that 'the determinative test is not based on what the national law may be regarded as commercial'.

On the other hand, New York Convention Art I(3) allows its Contracting States to apply the Convention 'only to differences arising out of the legal relationships which are considered as commercial under the national law of the State making such declaration'. This is known as the commercial reservation or declaration.

<sup>37</sup> John Mo, *International Commercial Law* (3<sup>rd</sup> ed, 2003) 693 para 12.8.

## 2 State, nation, country, place & law area

This thesis uses the words ‘State’, ‘nation’, ‘country’ and ‘place’ interchangeably to mean a sovereign nation, and will be confined to Convention countries, unless otherwise indicated.

It should be noted that ‘law area’ is a defined area with a distinct and single system of law. In countries with a unitary system of law such as England, there is only one law area within each of those countries, and accordingly the terms ‘law area’ and ‘country’ can be used synonymously.

By contrast, in countries with a federal system of law such as Australia and the United States, there are multiple law areas within each of those countries.<sup>38</sup> Here the terms ‘law area’ and ‘country’ are not synonymous.

## 3 Recognition, enforcement, annulment

### (a) *Judicial proceedings & decisions*

‘Recognition’ is a judicial decision which recognises the legal validity of an arbitral decision. It generally acts as a ‘shield’ against attempts to raise issues that have already been decided in arbitration.<sup>39</sup>

‘Enforcement’ is a judicial decision which gives practical effect to an arbitral decision by imposing legal sanctions against non-compliance with the recognised award – it is ‘a step further than recognition’ and can act as a ‘sword’ to compel compliance with the award.<sup>40</sup> In this context, recognition and enforcement ‘do run together’ – a court which enforces an award necessarily recognises that award.<sup>41</sup>

This thesis adopts the approach in IAA s 3(2) – namely, enforcement in relation to an award includes the recognition of that award. Accordingly, references to ‘enforcement’ and ‘non-enforcement’ will include recognition and non-recognition respectively.

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<sup>38</sup> These multiple law areas are commonly (but confusingly) referred to as ‘States’ (eg the State of Queensland), even though they are merely the subdivisions of a sovereign State.

<sup>39</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 690 para 26-10; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 22.

<sup>40</sup> Ibid.

<sup>41</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 515.

On the other hand, ‘annulment’ is a judicial decision which sets aside or invalidates an arbitral award.<sup>42</sup> It declares and renders that award null, void and therefore unenforceable. A court which refuses to annul an award may grant enforcement of that award.<sup>43</sup>

**(b) *Enforcement vs Supervisory State, court & jurisdiction***

The ‘enforcement State’ (or place of enforcement) is the country in which an award is sought to be enforced. This is usually the place where the parties’ assets are located. The ‘enforcement court’ (ie the court of the enforcement State) has ‘enforcement jurisdiction’ – it determines whether or not to enforce an award.

The ‘supervisory State’ (or place of rendition or origin) is the country in which, or under the law of which, an award is made. This is usually the ‘seat’ of arbitration, which determines the legal place of arbitration and whose laws apply to the arbitral procedure.<sup>44</sup> The ‘supervisory court’ (ie the court of the supervisory State) has supervisory, revisional or ‘curial jurisdiction’,<sup>45</sup> such as determining whether or not to annul an award.

Each of the Australian law areas (ie the States, Territories and the federal law area) can be ‘enforcement State’ or ‘supervisory State’.

#### **4 National law, private international law, public international law**

‘Private international law’ (also known as ‘conflict of laws’) governs transactions or relationships between private parties, as well as between private parties and State entities. However, despite the word ‘international’, private international law is part of a law area’s ‘national law’, which is often used interchangeably with ‘domestic law’,

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<sup>42</sup> ‘Annulment’ is also known as ‘*vacatur*’, declaration of nullity, vacating and revoking an arbitral award.

<sup>43</sup> See, eg, *Mond v Berger* [2004] VSC 45, para 114: “if an award is not set aside, it may be enforced.”

Chapters 5 and 7 further explore the distinction and interaction between enforcement and annulment.

<sup>44</sup> Michael Moser and Teresa Cheng, *Hong Kong Arbitration: A User's Guide* (2004) 109.

The New South Wales Court of Appeal has emphasised that the ‘seat’ of arbitration has a technical meaning – it is the ‘legal place’ and not the ‘physical place’ of the arbitration: see *Raguz v Sullivan* [2000] NSWCA 240, paras 97, 102 and 103.

<sup>45</sup> *Hiscox v Outwaite* [1992] 1 AC 562, 598 (Lord Oliver of Aylmerton).

‘local law’ and ‘municipal law’.<sup>46</sup>

By contrast, ‘public international law’ (also known as ‘international law’ and ‘the law of the nations’) governs transactions or relationships between sovereign States and international organisations. It is a separate system of law which does not pertain to any law area.

Nonetheless, private international law and public international law are becoming less distinguishable and more interactive with each other.<sup>47</sup>

## 5 Public policy

Owing to the ‘evolutive and relative’<sup>48</sup> nature of public policy, an exhaustive definition of public policy is neither possible nor desirable. The ‘public policy’ of a particular place can be defined as comprising the principles and rules ‘pertaining to justice or morality’ or serving ‘the essential political, social or economic interests’ of that place.<sup>49</sup>

Chapters 2 and 3 explore the characteristics and categories of public policy. However, a brief introduction to the two methods of classifying public policy is appropriate meanwhile.

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<sup>46</sup> A law area’s ‘national law’ comprises ‘domestic private law’ and ‘private international law’. A major function of private international law is to resolve ‘conflict of laws’ issues arising from relationships which have material foreign elements. For instance, it identifies which law area’s domestic private law should apply.

<sup>47</sup> See further discussions in Chapter 3 section 3.4.2 – ‘Fusion of international & transnational public policies caused by fusion of private & public international law’.

<sup>48</sup> Pierre Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ in Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999) 273.

<sup>49</sup> See ILA Resolution Rec 1(d).

In *Wilkinson v Osborne* (1915) 2 CLR 89, 97, Isaacs J defined public policy as ‘some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognise and enforce’. This definition has been adopted by *Butterworths Business & Law Dictionary* (2<sup>nd</sup> ed, 2002).

(a) *Categories of public policy*

Firstly, public policy can be categorised by reference to the substance-procedure distinction. ‘Substantive public policy’ concerns the contents of an arbitral award whereas ‘procedural public policy’ concerns the procedure pursuant to which an arbitral award is rendered.<sup>50</sup>

Secondly, public policy may pertain to one nation (ie ‘national public policy’<sup>51</sup>), a group of nations (ie ‘multinational public policy’<sup>52</sup>) or the international community as a whole (ie ‘transnational public policy’<sup>53</sup>).

National public policy is further divided into:

- ‘domestic public policy’ – ie public policy which applies territorially in the sense that it applies only to transactions or relationships which do not involve any foreign element;<sup>54</sup> and
- ‘international public policy’ – ie public policy which applies extra-territorially in the sense that it applies to transactions or relationships which involve foreign elements.<sup>55</sup>

Here it can already be seen that the category of ‘international public policy’ is likely to confuse as it is ‘national’ (in the sense of being part of national public policy), rather than ‘international’ in the ordinary sense of that word.<sup>56</sup>

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<sup>50</sup> See ILA Resolution Rec 1(c) and the examples in Rec 1(d). See further discussions in Chapter 2 section 2.3 – ‘Substantive & procedural public policies’.

<sup>51</sup> ‘National public policy’ is also known as ‘public policy based on national law’: Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 181-182.

<sup>52</sup> ‘Multinational public policy’ is also known as ‘regional public policy’, ‘community public policy’ and the civil law terminology, ‘*ordre public communautaire*’.

<sup>53</sup> ‘Transnational public policy’ is also expressed as ‘truly international public policy’, ‘genuinely international public policy’, ‘really international public policy’, ‘supranational public policy’ and the civil law terminology, ‘*ordre public reellement international*’.

<sup>54</sup> ‘Domestic public policy’ is also known as ‘internal public policy’ and the civil law terminology, ‘*ordre public interne*’.

<sup>55</sup> ‘International public policy’ is also known as ‘external public policy’ and the civil law terminology, ‘*ordre public international*’.

<sup>56</sup> See further discussions in Chapter 3, sections 3.3 (‘International vs Domestic public policies’) and 3.6.1 (‘Avoiding misnomers’).

Both methods of categorising public policy can operate concurrently. For instance, international public policy can be either substantive or procedural.<sup>57</sup>

**(b) Public policy & mandatory rules**

‘Mandatory rules’ are the imperative provisions of law which must be applied to a transaction or relationship involving foreign element, irrespective of the law that governs that transaction or relationship.<sup>58</sup> They can either be ‘purely of a policing nature’<sup>59</sup> (which are not public policy), or of a ‘public policy nature’<sup>60</sup> (which are also public policy).

Thus mandatory rules can be, but need not be, public policy. Similarly, public policy can be, but need not be, mandatory rules. Chapter 4 explores the distinction and interaction between public policy and mandatory rules.

**(c) Public policy & *lex mercatoria***

The literal translation of the ‘*lex mercatoria*’ is the ‘law of merchants’. Despite the ongoing debate on its content and even its existence, the *lex mercatoria* can be defined as comprising the rules and principles which govern international trade and commerce, and which are either independent of any national legal system or are common to several legal systems.<sup>61</sup> It is accepted as ‘law’ even though it does not derive from the traditional sources of law.<sup>62</sup>

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<sup>57</sup> See ILA Resolution Rec 1(c) and ILA Final Report 253.

<sup>58</sup> Daniel Hochstrasser, ‘Choice of Law and “Foreign” Mandatory Rules in International Arbitration’ (1994) 11 *Journal of International Arbitration* 57, 67.

<sup>59</sup> Marc Blessing, ‘Choice of Substantive Law in International Arbitration’ (1997) 14 *Journal of International Arbitration* 39, 61.

<sup>60</sup> AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 88.

<sup>61</sup> Karyn Weinberg, ‘Equity in International Arbitration: How Fair is “Fair”? A Study of Lex Mercatoria and Amiable Composition’ (1994) 12 *Boston University International Law Journal* 227; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 453-454 para 18-46.

<sup>62</sup> It has been argued that the *lex mercatoria* ‘does not purport to be a self-contained or autonomous legal system independent of national laws, but rather a source of law like international customary law that draws on a variety of sources such as practice, judicial precedents, treaties and national laws’: see Richard Garnett, ‘International Arbitration Law: Progress Towards Harmonisation’ [2002] 3 *Melbourne Journal of International Law* 400, 411.

Several scholars refer to the *lex mercatoria* as ‘international commercial law’, and more confusingly, as transnational commercial law, principles or rules, and even ‘public policy of the international community of merchants’.<sup>63</sup> This has led to the view that transnational public policy is ‘a hybrid between international public policy and the *lex mercatoria*’ – a view which reinforces the ambiguity and perplexity of ‘international public policy’.<sup>64</sup>

## 6 The ‘public policy exception’

The ‘public policy exception’ refers to the public policy exception to the enforcement of arbitral awards in any or all of the following legislative provisions.

- New York Convention Art V(2)(b): “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that... [t]he recognition or enforcement would be contrary to the public policy of that country.”
- Model Law Art 36(1)(b)(ii): “Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only... if the court finds that...the recognition or enforcement of the award would be contrary to the public policy of this State.”
- IAA s 8(7)(b): “In any proceedings in which the enforcement of a foreign award... is sought, the court may refuse to enforce the award if it finds that... to enforce the award would be contrary to public policy.”

For ease of reference, excerpts from the IAA, New York Convention and Model Law are appended to this thesis.<sup>65</sup>

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<sup>63</sup> See, eg, Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 807-808 para 1447; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 68 para 4-57; Michael Pryles, ‘Application of the Lex Mercatoria in International Commercial Arbitration’ (2004) 78 *Australian Law Journal* 396, 397; Peter Flanagan, ‘Demythologising the Law Merchant: The Impropriety of the Lex Mercatoria as a Choice of Law’ (2004) 15 *International Company & Commercial Law Review* 297; Loukas Mistelis, ‘Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards’ (2000) 2 *International Law Forum Du Droit International* 248, 251.

<sup>64</sup> Kenneth Curtin, ‘Redefining Public Policy in International Arbitration of Mandatory National Laws’ (1997) 64 *Defense Counsel Journal* 271.

See further discussions in Chapter 3 sections 3.4.3(a) (‘Application through the *lex mercatoria*’) and 3.6.6(a) (‘An alternative perception of transnational public policy’).

<sup>65</sup> See Appendix 2 – IAA; Appendix 3 – New York Convention; Appendix 4 – Model Law.



For the purposes of convenience and conciseness, this thesis uses the expression ‘public policy exception’ as shorthand for synonymous terms such as the ‘public policy exception to enforcement (of arbitral awards)’, the ‘public policy defence to enforcement (of arbitral awards)’, and the ‘public policy ground for non-enforcement (of arbitral awards)’.

Having set out the context, objectives and the relevant terminology of this thesis, the following section provides a brief overview of each chapter.

## **THESIS STRUCTURE, SCOPE & SIGNIFICANCE**

This thesis is confined to public policy as an exception to the enforcement of arbitral awards, which is known as ‘the public policy exception’. It examines the main controversies and complexities in the application of the public policy exception through the lens of the Australian judiciary, and its recommendations are intended for the Australian judiciary. Accordingly, any coverage of non-Australian law and arbitral decisions is for illustrative and comparative purposes only. In addition, any discussions on the application of public policy in other contexts (notably the annulment of arbitral awards, the enforcement of foreign judgments and the exclusion of foreign law) are for the same purposes only.

As the author has not had the benefit of practical experience in this area of the law, this thesis has been written from her perspective as an academic lawyer.

**Chapter 1** outlines Australia’s regulatory framework for the enforcement of arbitral awards, specifically the Australian implementation of the New York Convention and the Model Law, the interaction between Australia’s federal and state arbitration legislation, as well as the interaction between Australian laws concerning the enforcement of foreign awards and foreign judgments. It also outlines certain distinctive features of the Australian legal system which may impact on the Australian judiciary’s approach to the public policy exception.

To set the scene for a critical analysis of the so-called ‘narrow approach’ to the public policy exception, Chapter 1 introduces the author’s three stages in the application of the public policy exception to highlight the various dimensions or aspects of the narrow approach. For instance, at stage one (which determines whether the public policy exception is applicable), the enforcement court narrowly defines the scope, and therefore the applicability, of the public policy exception. At stage two (which determines whether the public policy exception is established), the enforcement court imposes a high standard of proof and thereby lowers the likelihood of establishing the public policy exception. At stage three (which determines whether to refuse or allow enforcement under the public policy exception), the enforcement court may proceed to enforce the award notwithstanding the establishment of the public policy exception.

Chapters 2 to 4 focus on stage one in the application of the public policy exception by examining the characterisation and categorisation of public policy, which are critical to determining the scope and applicability of the public policy exception.

**Chapter 2** begins by discussing how the characteristics of public policy define and narrow the scope of the public policy exception, considering relativity, fundamentality and extra-territoriality. It also discusses the substance-procedure distinction within the public policy exception, and the implications of such distinction. Despite its inclusion of both substantive and procedural public policies, the public policy exception envisages a narrow meaning of ‘public policy’.

**Chapter 3** examines the essence of the narrow approach – namely, the use of ‘international public policy’ to narrow the scope of the public policy exception. In spite of the ILA’s recent endorsement and clarification, international public policy may not be a suitable criterion for determining the enforceability of awards under the public policy exception in Australia. Its imprecise meaning has caused disagreement and even bewilderment among judges, arbitrators and scholars. Its resemblance and interaction with other categories of public policy (ie domestic, multinational and transnational public policies) may render the differentiation between these overlapping categories difficult, if not meaningless. Ironically and unfortunately, the concept of ‘international public policy’ risks turning the public policy exception, or the application of that exception, into an unruly horse.

**Chapter 4** complements the critical analysis of the narrow approach in Chapter 3 by exploring another reason why the public policy exception, or its application, remains unruly – namely, the perplexing distinction and interaction between public policy and mandatory rules. It presents an alternative approach to defining the scope of the public policy exception, which confines the public policy exception to ‘mandatory rules of public policy’. This proposed alternative to ‘international public policy’ uses the common denominators of public policy and mandatory rules, while incorporating the concepts of relativity, fundamentality, extra-territoriality and the substance-procedure distinction. It also identifies the sources of public policy as part of its endeavour to develop a definition of ‘public policy’ in the context of the public policy exception that is more suitable for Australia.

After exploring ‘why not international public policy’ and ‘why mandatory rules of public policy’, **Chapter 5** explores ‘why the narrow approach to the public policy exception’. It explores the rationales underlying the pro-enforcement policy and the public policy exception. The New York Convention’s ‘public policy paradox’ stems from the unexplained relationship or unresolved tension between the pro-enforcement policy and the public policy exception, which are two apparently competing public policies. This leads to the recommended alternative perception of the public policy paradox. The pro-enforcement policy and the public policy exception are not incompatible public policies which serve incompatible interests. Rather, they are interactive and even interdependent public policies which fulfil the ultimate and overriding objectives of preventing and sanctioning injustice, and thereby preserving integrity and faith in the system of arbitration.

Chapter 5 also explores other enforcement-related provisions and features, revealing additional paradoxes or tensions within the New York Convention. In particular, the exceptions to enforcement are exhaustive yet discretionary. This means that the enforcement court cannot refuse enforcement beyond the prescribed exceptions to enforcement, yet the enforcement court can still allow enforcement notwithstanding the applicability of one of the prescribed exceptions to enforcement.

Unlike other exceptions to enforcement, the public policy exception can be raised by both the parties and the enforcement court. By identifying the interaction between, and therefore the potential for the concurrent application of, the public policy exception and other exceptions to enforcement, Chapter 5 paves the way for a critical analysis of the narrow approach in stages two and three of applying the public policy exception.

**Chapter 6** explores where the unruly horse of public policy can carry the judges in the enforcement proceedings, dividing into two categories of case studies. The first category concerns awards based on allegedly illegal contracts – it exemplifies substantive public policy. The second category involves awards rendered in violation of due process – it exemplifies procedural public policy and therefore the overlap between the public policy exception and the due process exception to enforcement.

Chapter 6 also explores the circumstances in which the Australian judiciary should consider the public policy exception on their own motion. This complements the discussions on the criteria for exercising the judicial discretion to allow enforcement notwithstanding the establishment of the public policy exception, including partial enforcement by severing the unenforceable part of an award.

The lengthy discussions in Chapter 6 illustrate the continuing lack of judicial consistency and clarity in the application of the public policy exception. They also reinforce that such lack of consistency and clarity have been caused by the current definition of public policy and the current perception of the public policy paradox – namely, the use of international public policy to narrow the scope of the public policy exception in deference to the pro-enforcement policy. Furthermore, they demonstrate that merits review is inevitable (if not necessary) under the public policy exception. The overall conclusion is that the unruly horse of public policy has led some judges away from sound law, but fortunately without causing substantial injustice. Accordingly, recommendations are made throughout Chapter 6 on when and how the Australian judiciary should modify or otherwise depart from the narrow approach in order to avoid an unruly or unjust application of the public policy exception. These recommendations are premised on the recommended alternative perception of the New York Convention's public policy paradox.

Although this thesis is confined to the application of the public policy exception in enforcement proceedings, **Chapter 7** is nevertheless devoted to two annulment-related public policy issues which may prompt the unruly horse to bolt astray and cause havoc. It builds upon the discussions in Chapter 5 on the interaction between enforcement and annulment of awards. Public policy is also ground for annulment under the Model Law, while annulment is a ground for non-enforcement under the New York Convention.

Chapter 7 uncovers yet another conundrum posed by the New York Convention. The New York Convention's pursuit of greater enforceability of awards in preference to uniformity of enforcement means that the New York Convention does not provide for consistent or harmonious implementation of its pro-enforcement policy.

The first annulment-related question in Chapter 7 is whether the Australian judiciary should unify, or at least harmonise, their approach to the public policy in both enforcement and annulment proceedings. The second question asks the Australian judiciary to choose between the competing approaches, or adopt their own approach, to determining the enforceability of awards which have been annulled in another country. Chapter 7 ultimately recommends that any solution to these questions must ensure adequate and effective safeguards, for neither enforcement nor annulment of an award should cause or condone arbitral or judicial injustice. This is because neither the public policy exception nor the pro-enforcement policy condones such injustice.

Recommendations for the Australian judiciary are made throughout this thesis, especially in Chapters 4, 6 and 7. For ease of reference, Chapter 8 reproduces the main recommendations.

As reinforced by Chapter 8, these recommendations both modify and supplement those in the ILA Resolution. This is because, firstly, the recommendations are premised on a different perception of the public policy paradox, leading to a different approach to defining public policy and delimiting the scope of the public policy exception. The partial reconciliation between the public policy exception and the pro-enforcement policy by reference to their shared and overriding objective of justice, together with the proposed criterion of 'mandatory rules of public policy', seek to facilitate consistency and clarity in the judicial application of the public policy exception.

Secondly, the recommendations in this thesis encompass several issues not addressed in the ILA Resolution. They consider additional conundrums posed by the New York Convention which influence the judicial approach to the public policy exception. These issues include the interaction between the public policy exception and other exceptions to enforcement, the criteria for discretionary enforcement notwithstanding the applicability of the public policy exception, the circumstances for *ex officio* consideration of the public policy exception, and the interaction between enforcement and annulment of arbitral awards.

Thirdly, these recommendations are tailor-made for the Australian judiciary after considering certain distinctive features of the Australian arbitration law and the Australian legal system. They are Australian in perspective yet international in character.

Using the author's three stages of applying the public policy exception as the framework for its critical analysis of the current narrow approach to the public policy exception, this thesis attempts to tame the unruly horse by assisting the Australian judiciary with avoiding an unruly or unjust application of the public policy exception. It is hoped that these features of originality and uniqueness will contribute to further development and refinement in the law concerning public policy in the judicial enforcement of arbitral awards.

The law is stated as at 31 August 2005.

## CHAPTER 1

### THE PUBLIC POLICY EXCEPTION TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

#### 1.1 INTRODUCTION

This Chapter provides an overview of the Australian regulatory regime for the enforcement of arbitral awards, identifying certain distinctive features of the Australian legal system which may shape the Australian judiciary's approach to the public policy exception. It then provides an overview of the so-called narrow approach to the public policy exception to lay the groundwork for a critical analysis of such approach throughout this thesis.

#### 1.2 AUSTRALIAN LAW ON ENFORCEMENT OF ARBITRAL AWARDS

As a federation, Australia has at least nine law areas – six states, two internal territories plus a 'federal law area'.<sup>66</sup> It has multilevel arbitration legislation. At the federal level, the *International Arbitration Act 1974 (IAA)* has implemented both the New York Convention and the Model Law.<sup>67</sup> Such legislative implementation was necessary as international treaties such as the New York Convention are not self-executing in Australia.<sup>68</sup> The Model Law, being an international instrument but not a treaty, is also non-binding until its incorporation into the Australian domestic law.<sup>69</sup>

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<sup>66</sup> The 'federal law area' is commonly known as 'the Commonwealth of Australia'.

<sup>67</sup> Section 4 of the IAA approves Australia's accession to the New York Convention while s 16(1) gives the Model Law the force of law in Australia.

According to the second reading speech by Senator Douglas McClelland on the *Arbitration (Foreign Awards & Agreements) Bill 1974*, the necessary legislation was not introduced until 1974, although all the Australian states had indicated their support for adopting the New York Convention '[a]s far back as 1959': see Commonwealth, *Parliamentary Debates*, Senate, 2 October 1974, 1590.

<sup>68</sup> *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 193 (Gibbs CJ), 212 (Stephen J) and 224 (Mason J); *Commonwealth v Tasmania* (1983) 158 CLR 1; *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 55 (Brennan J) and 79 (Deane & Gaudron JJ); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-288 (Mason CJ & Deane J), 298 (Toohey J) and 315-316 (McHugh J).

<sup>69</sup> John Mo, *International Commercial Law* (3<sup>rd</sup> ed, 2003) 700 para 12.31.

At the state level, there is virtually uniform legislation known as the *Commercial Arbitration Act (CAA)*.<sup>70</sup> The CAA concerns domestic awards (ie awards made in Australia), whereas the IAA concerns awards governed by the New York Convention or the Model Law. Excerpts from the CAA are also appended to this thesis.<sup>71</sup>

### 1.2.1 Mechanics of enforcement

An award which falls within the scope of the New York Convention is recognised as binding on the parties,<sup>72</sup> and may be enforced in a court of an Australian State or Territory as if it had been validly made in that State or Territory.<sup>73</sup> The party seeking enforcement of that award simply needs to produce to the relevant court the certified award and arbitration agreement together with any necessary certified translation.<sup>74</sup> Foreign awards are primarily enforceable under the IAA but may also be enforced under the CAA.<sup>75</sup>

On the other hand, awards which fall outside the scope of the New York Convention may be enforceable under the Model Law;<sup>76</sup> or legislation governing the enforcement of foreign judgments;<sup>77</sup> or as the last resort, the common law.<sup>78</sup>

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<sup>70</sup> *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); and *Commercial Arbitration Act 1990* (Qld).

<sup>71</sup> See Appendix 5 – CAA (Qld).

<sup>72</sup> IAA s 8(1).

<sup>73</sup> IAA s 8(2).

<sup>74</sup> IAA s 9.

<sup>75</sup> See section 1.2.1(b) of this Chapter – ‘IAA & CAA’.

<sup>76</sup> See section 1.2.1(a) of this Chapter – ‘IAA, New York Convention & Model Law’.

<sup>77</sup> See section 1.2.1(c) of this Chapter – ‘IAA & FJA’.

<sup>78</sup> The common law method of enforcement is cumbersome and expensive as it requires a court action upon the relevant award – for instance, to sue on the award as evidence of debt. The party seeking enforcement must prove: (a) submission to arbitration; (b) conduct of arbitration in pursuance of the submission; and (c) award validly rendered pursuant to the provisions of the submission and to the law of the place of rendition: see *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 28 Lloyd’s Rep 104; *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd’s Rep 223.



(a) *IAA, New York Convention & Model Law*

The IAA substantially reproduces the ‘enforcement provisions’ of the New York Convention,<sup>79</sup> albeit with some textual differences which will be explored throughout this thesis. The Model Law’s enforcement provisions also mirror those of the New York Convention.<sup>80</sup>

Nevertheless, the Model Law and the New York Convention do not have an identical scope of application. For instance, the Model Law is not confined to ‘foreign arbitral awards’ (ie awards which are made and sought to be enforced in different places), although it is confined to ‘international commercial arbitration’.<sup>81</sup>

Section 4 of the IAA states that Australia’s accession to the New York Convention is ‘without any declaration’ under Art I(3) of the New York Convention, presumably without the reciprocity reservation and the commercial reservation.<sup>82</sup> However, other provisions in the IAA effectively adopt the reciprocity reservation as they limit the application of the New York Convention to awards made in Convention countries other than Australia.<sup>83</sup>

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<sup>79</sup> See IAA ss 7-9, which implement New York Convention Arts IV and V. This thesis refers to these provisions as the ‘enforcement provisions’.

<sup>80</sup> See Model Law Arts 35 and 36.

<sup>81</sup> See Model Law Art 1 and New York Convention Art 1, as discussed earlier in section 1 of the Introduction (Terminology – ‘International commercial arbitration & foreign arbitral awards’).

See also the Explanatory Note on the Model Law (UN Doc A/40/17) para 46: “By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between ‘international’ and ‘non-international’ awards instead of the traditional line between ‘foreign’ and ‘domestic’ awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of ‘international’ awards, whether ‘foreign’ or ‘domestic’, should be governed by the same provisions.”

<sup>82</sup> New York Convention Art I(3) allows its Contracting States to confine its scope of application to awards which are made in other Contracting States only (ie the reciprocity reservation), or which arise from arbitration considered to be commercial under the relevant domestic law (ie the commercial reservation).

Australia has only made declaration pursuant to New York Convention Art X(1) to extend the Convention’s application to its external territories: see *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [1975] Australian Treaty Series 25, <<http://www.austlii.edu.au>> at 1 October 2005.

<sup>83</sup> See the definition of ‘foreign award’ in IAA s 3(1), as previously discussed in section 1 of the Introduction (Terminology – ‘International commercial arbitration & foreign arbitral awards’). See also IAA s 8(4), which confines the IAA’s enforcement provisions to awards which are made in Convention

Pursuant to the IAA, the enforcement provisions in the Model Law do not apply if the New York Convention applies.<sup>84</sup> Furthermore, the IAA allows the parties to contract out of the Model Law.<sup>85</sup>

**(b) IAA & CAA**

There appears to be little overlap between the IAA and CAA. The CAA is mainly concerned with domestic awards, and does not provide for the public policy exception or any other exceptions to enforcement. In any event, the IAA, being a federal law, would prevail over the CAA to the extent of any consistency.<sup>86</sup>

However, the CAA may apply to foreign awards if neither the New York Convention nor the Model Law applies.<sup>87</sup> Apart from the ability under the IAA to opt out of the Model Law,<sup>88</sup> there is judicial recognition that the parties may also exclude the operation of the IAA (and therefore the New York Convention).<sup>89</sup> In these circumstances, the parties may seek to enforce their awards under the CAA.

Section 8(2) of the IAA states that ‘a foreign award may be enforced in a court of a State or Territory’. Section 33 of the CAA requires a State or Territory court’s leave to enforce an award ‘in the same manner as a judgment or order of the court to the same effect’.

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countries, unless the person seeking enforcement is domiciled or ordinarily resident in Australia or in a Convention country.

<sup>84</sup> IAA s 20. Conversely, if the New York Convention does not apply, then the enforcement provisions in the Model Law may apply: Michael Pryles, ‘Australia’ in Global Legal Group, *International Comparative Legal Guide to International Arbitration 2004* (2004), 48.

<sup>85</sup> IAA s 21.

See Michael Pryles, ‘Exclusion of the Model Law’ (2001) 4 *International Arbitration Law Review* 175 for the various methods of excluding the Model Law. These include: (a) express provision that the Model Law is excluded; (b) adoption of another governing law eg *American Diagnostica Inc v Gradipore* (1998) 44 NSWLR 312; (c) selection of a particular set of arbitration rules to govern the arbitration eg *Australian Granites Ltd v Eisenwerk Hensel v Bayreuth Dipl.-Ing Burkhardt GmbH* [2001] 1 Qd R 461.

<sup>86</sup> *Commonwealth of Australia Constitution Act* (Cth) s 109.

<sup>87</sup> IAA s 12(2).

<sup>88</sup> IAA s 21.

<sup>89</sup> *Abigroup Contractors Pty Ltd v Transfield Pty Ltd & Obayashi Corporation* [1998] VSC 103 held that parties to a foreign arbitration agreement could exclude the operation of the IAA, specifically IAA s 7, which provides for the enforcement of arbitration agreements by staying court proceedings. According to the Victorian Supreme Court (at para 109): “there is nothing in the [IAA] which shows an intention by the Commonwealth Parliament to exclude the rights of parties to an arbitration agreement, to agree that the provisions of the [IAA], [New York] Convention or Model Law do not apply to a foreign arbitration.”

Accordingly, IAA s 8(2) directs a party wishing to enforce an award to apply for the court's leave under CAA s 33 – it 'makes the foreign award completely analogous to a domestic award with respect to its enforcement'.<sup>90</sup> Furthermore, since the CAA does not provide for any exceptions to enforcement, a party wishing to resist the enforcement of that award may raise the exceptions specified in IAA s 8, including the public policy exception.<sup>91</sup> Thus the IAA and CAA may apply concurrently.<sup>92</sup>

### (c) IAA & FJA

A foreign judgment entered in terms of a foreign award may be enforceable as a registered judgment under the *Foreign Judgments Act 1991* (Cth) (**FJA**).<sup>93</sup> Although the definition of 'judgment' in FJA s 3 includes arbitral awards,<sup>94</sup> FJA s 10(2) states that the mechanism of enforcement by registration under the FJA does not affect the enforcement of awards under the IAA.<sup>95</sup> This mirrors the common law position that the entry of a foreign judgment in terms of an award does not merge or absorb that award

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<sup>90</sup> *Brali v Hyundai Corp* (1988) 15 NSWLR 734, 743.

<sup>91</sup> IAA ss 8(5) and (7) provide for the exceptions to enforcement, which implement Art V of the New York Convention.

*International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (1995) 128 FLR 458 is an example of an application under CAA s 33 to refuse enforcement of an award on the basis of the exceptions to enforcement in IAA s 8. See further discussions in Chapter 6 section 6.6.2 – 'Severance & partial enforcement'.

<sup>92</sup> *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, para 245 (citing *Abigroup Contractors Pty Ltd v Transfield Pty Ltd & Obayashi Corporation* [1998] VSC 103).

Thus it is 'common practice' for parties to proceed under both the IAA and CAA: Doug Jones, 'Enforcement of Foreign Arbitral Awards and Judicial Intervention in Australia' (Paper presented at the Inaugural Arbitration Conference, 1 March 2003) 8.

<sup>93</sup> A registered foreign judgment has the same force and effect as if it had been given by an Australian court in which it is registered: FJA s 6(7).

<sup>94</sup> The inclusive definition of 'judgment' in FJA s 3 refers to 'an award...in proceedings on an arbitration conducted in, and under the law applying in, a country, being an award that has become enforceable in a court of that country in the same manner as a judgment or order given by that court'.

However, this definition excludes 'ICSID' awards – ie awards governed by the *Convention on the Settlement of Investment Disputes between States & Nationals of Other States* 1975 (which is adopted by Part IV of the IAA). This treaty concerns arbitration between sovereign States and foreign investors, and is beyond the scope of this thesis.

<sup>95</sup> Similarly, IAA s 12(2) states that nothing in the IAA's enforcement provisions 'affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of [the IAA]'.

According to Senator Douglas McClelland's second reading speech on the *Arbitration (Foreign Awards & Agreements) Bill 1974*, the IAA 'expressly preserves the existing procedures', although it also 'provides for an additional procedure that will be simpler, less expensive and generally more satisfactory': see Commonwealth, *Parliamentary Debates*, Senate, 2 October 1974, 1589.

into that judgment.<sup>96</sup> In other words, the award remains potentially enforceable under the New York Convention. This ‘non-merger rule’ stems from the judicial recognition that ‘an award may be more easily enforceable than a foreign judgment’,<sup>97</sup> particularly in light of the New York Convention’s pro-enforcement policy.

### 1.2.2 Relevant features of the Australian legal system

Australian courts ‘have rarely been called upon to interpret provisions of the New York Convention’,<sup>98</sup> and they ‘rarely refuse enforcement’.<sup>99</sup> It is thus useful to outline several features of the Australian legal system that may influence Australian courts’ approach to the public policy exception.

First, the different law areas within Australia have different laws and public policies. For instance, the Queensland Supreme Court may apply the public policy of Queensland (as opposed to the public policy of Australia) when determining an award’s enforceability under the public policy exception.

Second, judicial attitudes towards arbitration are not uniform throughout Australia – ‘the pendulum swings different ways in different jurisdictions’.<sup>100</sup>

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<sup>96</sup> *Brali v Hyundai Corp* (1988) 15 NSWLR 734, 739.

<sup>97</sup> Ibid 740 and 742. In the *Brali case*, Rogers CJ refused to consider the argument that FJA s 10 is inoperative to the extent of its conflict with IAA s 8(2). However, at 745 he commented that the IAA ‘intended that awards should be enforceable in conformity with the New York Convention and if...the [FJA] works to prevent that result, then, to that extent, it would be inoperative’.

Pursuant to the ‘doctrine of merger’, only the judgment is enforceable and not the award. The courts in other countries have also rejected this doctrine, or embraced the ‘non-merger rule’. See, eg, *Mehta v Mehta*, Supreme Court of India, 13 May 1999, extract in Yearbook Commercial Arbitration (India No. 30), <<http://www.kluwerarbitration.com>> at 26 July 2004. For other countries (including Germany, the Netherlands and Canada), see Richard Mosk and Ryan Nelson, ‘The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions’ (2001) 18 *Journal of International Arbitration* 463, 467; and Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (2002), 429.

<sup>98</sup> Doug Jones, ‘Enforcement of Foreign Arbitral Awards and Judicial Intervention in Australia’ (Paper presented at the Inaugural Arbitration Conference, 1 March 2003) 4.

<sup>99</sup> Michael Pryles, ‘Australia’ in Global Legal Group, *International Comparative Legal Guide to International Arbitration 2004* (2004) 48.

<sup>100</sup> See Romauld Andrew, ‘The Ill-favoured Child of Litigation: International Commercial Arbitration and the Australian Trade Practices Act 1974’ (2004) 21 *Journal of International Arbitration* 239. For example, in the context of arbitrability or enforcement of arbitral agreements, the New South Wales and Victorian Supreme Courts are more pro-arbitration whereas the Federal Courts remain conservative.

While these are potential sources of inconsistency in the judicial application of the public policy exception, the High Court of Australia can nevertheless resolve any inconsistency as part of its endeavour to develop ‘a single common law of Australia’.<sup>101</sup> In addition, the doctrine of precedent together with judicial comity may operate as ‘a powerful tool of harmonisation within the Australian court system’.<sup>102</sup>

The third feature is that, Australia, being a common law country with a hybrid of case law and statute law, is subject to increasing internationalisation. Not only has the Federal Parliament frequently enacted legislation to implement international conventions and treaties (ie international law as a direct source of Australian law), Australian courts also frequently refer to international law to fill gaps in the law, or to ensure that their decisions are consistent with Australia’s international obligations (ie international law as an indirect source of Australian law).<sup>103</sup> A likely consequence of this feature is that Australian courts, especially the High Court, may be receptive to the concepts of ‘transnational public policy’ and the ‘*lex mercatoria*’.<sup>104</sup>

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<sup>101</sup> *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 630 (Gleeson CJ et al).

The term ‘common law’ has three different meanings: first, common law as a system of law in contrast with the civil law system (adversarial vs inquisitorial); second, common law as a source of law in contrast with statute law; and third, common law as a branch of law in contrast with the rules and principles of equity.

<sup>102</sup> James Crawford and Brian Opeskin, *Australian Courts of Law* (4<sup>th</sup> ed, 2004) 20.

The doctrine of precedent (or ‘*stare decisis*’) means that ‘a court must apply or follow the *ratio decidendi* (ie reason for the decision or rule) in the same hierarchy where the facts of the cases are alike’: see Prue Vines, *Law & Justice in Australia: Foundations of the Legal System* (2005) 299.

<sup>103</sup> See, eg, Chief Justice Murray Gleeson, ‘Global Influences on the Australian Judiciary’ (2002) 22 *Australian Bar Review* 184, 188: “there is a growing awareness...of the importance of looking beyond our own statutes and precedents, and our traditional sources, in formulating answers to legal problems. Our law is increasingly aware of, and responsive to, the guidance we can receive from civil law countries. Ultimately, the issues that arise, and the problems that require action, are in many respects the same throughout the large parts of the world. The forces of globalisation tend to standardise the questions to which a legal system must respond. It is only to be expected that there will be an increasing standardisation of the answers.”

See also Sir Anthony Mason, ‘The Influence of International and Transnational Law on Australian Municipal Law’ (1996) 7 *Public Law Review* 20, 25: “Australian courts regularly make use of the comparative jurisprudence of transnational and national tribunals.”

However, the High Court was divided on the question of whether the Commonwealth Constitution of Australia should be construed in accordance with international law: see *Al-Kateb v Godwin* (2004) 208 ALR 124, particularly the disagreement between McHugh J (paras 63-71) and Kirby J (paras 152, 173, 181 and 190).

<sup>104</sup> According to Sir Anthony Mason, *The Influence of International and Transnational Law on Australian Municipal Law* (1996) 7 *Public Law Review* 20, 29: “Just as the Australian economy cannot be insulated from the impact of the international economy and the economies of other countries, so Australian national

Another reason for such receptiveness is the fourth feature – the fusion of the common law and equity.<sup>105</sup> This is because certain principles of the *lex mercatoria* such as good faith resemble the principles of equity as applied in Australia. Like the *lex mercatoria*, the common law and equity ‘both derive their content from the prevailing public and moral or community values’.<sup>106</sup>

Finally, Australian private international law ‘discloses a strong policy in favour of recognising foreign legal acts’, including judgments and arbitral awards.<sup>107</sup> For instance, Australian judges have been reluctant to use public policy to refuse the enforcement of foreign judgments.<sup>108</sup> Does such reluctance extend to the non-enforcement of foreign awards? In other words, do Australian courts also favour a narrow approach to the public policy exception to the enforcement of arbitral awards? It is timely to explore the meaning and various dimensions of the so-called ‘narrow approach’.

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law cannot be insulated from the influence of international and transnational law. International and transnational law is exercising a marked influence on Australian municipal law.”

<sup>105</sup> The *Judicature Acts* of 1873 and 1875 (UK) fused the administration of common law and equity by abolishing the separate courts of common law and equity, and by empowering the courts to administer the principles of both common law and equity. The legislatures of the Australian States and Territories have adopted these legislative reforms: see, eg, *Judicature Act 1876* (Qld).

<sup>106</sup> Duncan Miller, ‘Public Policy in International Commercial Arbitrations in Australia’ (1993) 9 *Arbitration International* 167, 185.

<sup>107</sup> Michael Pryles, ‘Internationalism in Australian Private International Law’ (1989) 12 *Sydney Law Review* 96, 131.

<sup>108</sup> See, eg, *Stern v National Australia Bank* [1999] FCA 1421 (particularly paras 138, 140 and 141); *De Santis v Russo* [2001] QSC 65 para 19 and [2001] QCA 457 para 7.

Public policy is one of the exceptions to the enforcement of foreign judgments under the Australian common law. There is also a similar public policy exception in FJA s 7(2)(xi), which requires the court to set aside a registered judgment ‘if it is satisfied... that the enforcement of the judgment..., would be contrary to public policy’. See further discussions in Chapter 4 section 4.4.1 – ‘Australian cases concerning the public policy exception to the enforcement of foreign judgments’.

### 1.3 THE NARROW APPROACH TO THE PUBLIC POLICY EXCEPTION

“The general pro-enforcement bias informing the [New York] Convention... points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention’s basic effort to remove pre-existing obstacles to enforcement.”<sup>109</sup>

The above judicial statement represents the prevailing judicial perception that the pro-enforcement policy of the New York Convention intends a narrow approach to the public policy exception.

The ‘pro-enforcement policy’, also known as the ‘pro-enforcement bias’, seeks to uphold the finality and enforceability of arbitral awards. It is part of the ‘public policy in favour of arbitration’ or the ‘pro-arbitration policy’.<sup>110</sup> The wider ‘pro-arbitration policy’ seeks to uphold the enforceability of both arbitral awards and arbitration agreements.

The pro-enforcement policy is expressed in, or at least evinced by, the various provisions of the New York Convention. For instance, Art III of the New York Convention requires enforcement States to ‘recognize arbitral awards as binding and enforce them’, while prohibiting the imposition of ‘substantially more onerous conditions’ than those of the Convention. Article V provides an apparently exhaustive list of exceptions to enforcement. Art VII provides for enforcement under the domestic law of an enforcement State if that law is more favourable than the New York Convention.

The ‘narrow approach’ to the public policy exception means that an enforcement court should only refuse to enforce an award under the public policy exception in ‘exceptional circumstances’, ‘very strong’ or ‘extreme cases’.<sup>111</sup> This section provides an overview of the ‘narrow approach’ by reference to three distinctive stages in applying the public policy exception.

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<sup>109</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l’Industrie du Papier*, 508 F 2d 969, 973 (2<sup>nd</sup> Cir, 1974).

<sup>110</sup> *Fotochrome Inc v Copal Co Ltd*, 517 F 2d 512, 516 (2<sup>nd</sup> Cir, 1975).

<sup>111</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Litton PJ); ILA Resolution Rec 1(a); Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 268.

### 1.3.1 Stages in the application of the public policy exception

There are three stages in determining whether or not an award is enforceable under the public policy exception:

- Stage one – does the alleged public policy fall within the public policy exception (ie is the public policy exception applicable)?
- If yes, then stage two – would the enforcement of the award be contrary to this public policy (ie is the public policy exception established)?
- If yes, then stage three – should the enforcement court nevertheless allow enforcement despite the establishment or applicability of the public policy exception?

#### (a) *Stage one: Is there an applicable ‘public policy’?*

The alleged public policy must be ‘public policy’ within the meaning of the public policy exception – otherwise the public policy exception does not apply. This raises questions such as whose, what and which public policy is relevant. The following are illustrations or the various dimensions of the narrow approach at stage one of applying the public policy exception.

- The phrase ‘the public policy of that country’ in New York Convention Art V(2)(b) means that only the public policy of the enforcement State is applicable.<sup>112</sup> Contravention of another State’s public policy may not justify non-enforcement under the public policy exception.<sup>113</sup>

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<sup>112</sup> See, eg, *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22), para 19 <<http://www.kluwerarbitration.com>> at 26 July 2004: “Enlarging the field of enquiry to include public policies of the courts whose law governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the [New York Convention].” This was cited and followed in *Smita Conductors Ltd v Euro Alloys Ltd*, (2001) 7 SCC 728 (Supreme Court of India, 31 August 2001), extract in Yearbook Commercial Arbitration (India No. 38), <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>113</sup> Ibid. See further discussions in Chapter 2 section 2.2.1(a) – ‘Public policy of the enforcement State’.



- The applicable public policy is confined to the enforcement State's 'most basic notions of morality and justice',<sup>114</sup> 'fundamental principles of law and justice',<sup>115</sup> or 'explicit principles of justice and fairness'.<sup>116</sup> It does not include all of the enforcement State's public interests, political interests or mandatory rules.<sup>117</sup>
- This concept (or requirement) of fundamentality also means that the public policy exception is confined to the enforcement State's 'international public policy' – ie public policy which applies 'not only to purely internal matters but even to matters with a foreign element by which other States are affected'.<sup>118</sup> The reasons for non-enforcement of a foreign award must 'go beyond the minimums which would justify setting aside a domestic judgment or award'.<sup>119</sup>

**(b) Stage two: Would enforcement 'be contrary to' the applicable public policy?**

Stage two concerns the second element of the public policy exception – namely, the enforcement of the award would contravene the applicable public policy. This raises questions such as what must be contrary to public policy, and what is the required degree of contravention. At this stage the enforcement court can apply the narrow approach in the following ways.

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<sup>114</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 974 (2<sup>nd</sup> Cir, 1974).

Mason NPJ in *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 refers to 'fundamental conceptions of morality and justice'.

<sup>115</sup> *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614, para 56 (New Zealand Court of Appeal).

<sup>116</sup> *Corporacion Transnacional de Inversiones S.A. de C.V. v STET International S.p.A* (1999) 45 O.R. (3d) 183 (Ontario Superior Court of Justice) para 30, upheld by the Ontario Court of Appeal in (2000) 49 O.R. (2d) 414.

<sup>117</sup> See further discussions in Chapter 2 section 2.2.3 ('Fundamentality').

<sup>118</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), 6 (Bokhary PJ) <<http://www.hklii.org>> at 5 November 2003.

<sup>119</sup> *Ibid.* See further discussions in Chapter 2 section 2.2.3(b) – 'International public policy'.

- Pursuant to the phrase ‘recognition of enforcement of the award’ in New York Convention Art V(2)(b), it is the enforcement of the award, and not the award itself, that must be contrary to the applicable public policy.<sup>120</sup> For instance, an award’s contravention of the enforcement State’s mandatory rules does not necessarily render the enforcement of that award contrary to the enforcement State’s public policy.<sup>121</sup>
- If the arbitrator has made findings against the alleged public policy or the alleged contravention of that public policy, then the enforcement court may refuse to interfere with those findings in the absence of admissible new evidence.<sup>122</sup> This restricts the party’s ability to establish the public policy exception and therefore promotes the enforcement of arbitral awards.
- Enforcement of an award must offend the applicable public policy ‘in a fundamental way’<sup>123</sup> or ‘in an intolerable manner’.<sup>124</sup> In other words, the alleged public policy violation must be manifestly or sufficiently serious in order to justify non-enforcement. This is in spite of the fact that Art V(2)(b) does not expressly require the public policy violation to be manifest, clear or obvious.<sup>125</sup>

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<sup>120</sup> One of the superseded versions of the public policy exception used the expression ‘the award would have the effect of compelling the parties to act in a manner contrary to public policy in the country of enforcement’: see *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Comparison of Drafts Relating to Articles III, IV and V*, UN ESC, UN Doc E/CONF.26/L.33/Rev.1 (29 May 1958).

<sup>121</sup> In *Adviso NV v Korea Overseas Construction Corp*, 14 February 1995, extract in Yearbook Commercial Arbitration XXI (1996, Korea No. 3) <<http://www.kluwerarbitration.com>> at 18 November 2003, the Supreme Court of Korea held that a foreign limitation period did not render the enforcement of the award in violation of Korean public policy. See further discussions in Chapter 2 section 2.2.3(a) – ‘Fundamentality: Case illustrations’.

<sup>122</sup> See further discussions in Chapter 6 section 6.4.6 – ‘Admissibility of new evidence of illegality’.

<sup>123</sup> *Corporacion Transnacional de Inversiones S.A. de C.V. v STET International S.p.A* (2000) 49 O.R. (2d) 414, para 2 citing *Schreter v Gasma Inc.* (1992) 7 O.R. (3d) 608.

<sup>124</sup> See *Obergericht of Basle* (Swiss Federal Supreme Court), 3 June 1971, extract in Yearbook Commercial Arbitration (Switzerland No. 5) <<http://www.kluwerarbitration.com>> at 27 July 2004.

See also *Inter Maritime Management SA v Russin & Vecchi* (Swiss Supreme Court), 9 January 1995, extract in Yearbook Commercial Arbitration XXII (1997, Switzerland No. 28, para 22) <<http://www.kluwerarbitration.com>> at 8 February 2005.

<sup>125</sup> The Committee on the Enforcement of International Arbitral Awards of the United Nations Economic and Social Council have considered wordings such as ‘clearly incompatible with public policy’ and ‘manifestly repugnant to public policy’: see *Report of the Committee on the Enforcement of International Arbitral Awards*, UN ESC, 19<sup>th</sup> session, UN Doc E/AC.42/4 (21 March 1955) para 49; *Report of the Committee on the Enforcement of International Arbitral Awards*, UN ESC, 19<sup>th</sup> session, UN Doc

(c) ***Stage three: Should enforcement be allowed notwithstanding the public policy exception?***

Even when all the elements of the public policy exception are established, the enforcement court may proceed to the third and final stage of determining whether the award should nevertheless remain enforceable. The phrase ‘may be refused’ in Art V gives the enforcement court the discretion to enforce the award even if such enforcement may contravene the applicable public policy. The court may exercise this discretion if it considers that the degree or the consequences of the public policy violation do not justify non-enforcement. The court may also allow enforcement if it considers that the defendant has waived, forfeited, or is otherwise estopped from invoking the public policy exception.<sup>126</sup>

### **1.3.2 Conclusions**

The narrow approach to the public policy exception has multiple dimensions.

At stage one in the application of the public policy exception, the enforcement court construes the phrase ‘public policy’ narrowly. This narrows the scope of the public policy exception.

At stage two, the enforcement court is reluctant to conclude that the public policy exception is established – namely, the ‘enforcement’ of the award would not be ‘contrary to’ the applicable public policy after construing those words narrowly. This confines the establishment of the public policy exception to exceptional or extreme cases.

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E/AC.42.4/Rev.1 (28 March 1955); *Recognition and Enforcement of Foreign Arbitral Awards – Report by the Secretary-General*, UN ESC, 21<sup>st</sup> session, UN Doc E/2822 (January 1956).

On the other hand, the public policy exception in Art 9(1)(e) of the *Convention on Exclusive Choice of Court Agreements* (concluded 30 June 2005) uses the phrase ‘manifestly incompatible’ with the enforcement State’s public policy’. The use of the word ‘manifestly’ indicates the drafters’ intention to give this exception a narrow scope by limiting its application to ‘cases of serious breaches’: Richard Garnett, ‘The internationalisation of Australian jurisdiction and judgments law’ (2004) 25 *Australian Bar Review* 205, 223.

Interestingly, Art 34(1) of the *European Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (No 44/2001, entered into force on 1 March 2002), also uses a similar wording of ‘manifestly contrary to public policy’. This Regulation essentially replaces the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (concluded 27 September 1968), whose public policy exception in Art 27(1) omits the word ‘manifestly’.

<sup>126</sup> Chapter 5 section 5.3.2 explores the discretionary nature of Art V, while Chapter 6 section 6.5.3 examines the circumstances in which the enforcement court may exercise its discretion to allow enforcement notwithstanding the public policy violation.

At stage three, the enforcement court is willing to conclude that, just as enforcement ‘may be refused’ under the public policy exception, enforcement may also be allowed despite the establishment of the public policy exception.

The following chapters critically analyse the narrow approach in all three stages of applying the public policy exception. Chapters 2 to 4 focus on stage one, while Chapters 5 to 6 focus on stages two and three.

## CHAPTER 2

### MEETING THE UNRULY HORSE – CHARACTERISATION OF PUBLIC POLICY

#### 2.1 INTRODUCTION

“The common-law tradition continues to cherish the ‘unruly horse’ metaphor, convinced that public policy can at any time carry the courts to unpredictable destinations. The civil-law tradition regards the more or less analogous notion of *ordre public* as an invertebrate ‘chameleon’, and thus, no less a threat to legal certainty and predictability.”<sup>127</sup>

The scope of the public policy exception to the enforcement of arbitral awards depends on the enforcement court’s perception of what constitutes ‘public policy’.<sup>128</sup> Public policy has been described as ‘multi-faceted’<sup>129</sup>, ‘open-textured and flexible’<sup>130</sup> with ‘various guises’<sup>131</sup> and therefore a ‘great diversity in the vocabulary and ambiguities’.<sup>132</sup> The legislatures and courts are, understandably, reluctant to define public policy exhaustively.<sup>133</sup> Nor does the New York Convention provide any guidance on the

<sup>127</sup> Homayoon Arfazadeh, 'In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception' (2002) 13 *American Review of International Arbitration* 43, 43.

<sup>128</sup> The ‘public policy exception’ is embodied in New York Convention Art V(2)(b), Model Law Art 36(1)(b)(ii) and IAA s 8(7)(b), as outlined in section 6 of the Introduction (Terminology – ‘The public policy exception’).

<sup>129</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Litton PJ).

<sup>130</sup> *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22) para 26, <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>131</sup> Duncan Miller, 'Public Policy in International Commercial Arbitrations in Australia' (1993) 9 *Arbitration International* 167, 195.

<sup>132</sup> Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 260.

<sup>133</sup> In *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Co and Shell International Co Ltd* [1987] 2 Lloyd's Rep 246, Donaldson MR in the English Court of Appeal said that considerations of public policy ‘can never be exhaustively defined, but they should be approached with extreme caution’.

In *Wilkinson v Osborne* (1915) 2 CLR 89 at 97, Isaacs J defined public policy as ‘some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognise and enforce’. The definition of public policy is subject to continuing judicial discussions in Australia, particularly in the context of illegality of contracts – see *Fitzgerald v Leonhardt Pty Ltd* [1997] HCA 17, as discussed in Chapter 6 section 6.4 – ‘Case study 1: Illegality’.

See also the non-exhaustive definition of public policy in IAA s 19, which is discussed in section 2.3.2 of this Chapter – ‘Public policy vs *Ordre public*’.

interpretation of public policy. Thus in spite of the ILA Resolution, the UNCITRAL Secretariat has recently recommended further study on how the Convention countries interpret the public policy exception.<sup>134</sup>

This Chapter examines how the characteristics of public policy define and narrow the scope of the public policy exception, as well as why the ‘unruly horse’ metaphor has endured to date. It also introduces the substance-procedure distinction within the public policy exception, which aligns the common law concept of ‘public policy’ with the civil law concept of ‘*ordre public*’.

## 2.2 NARROWING THE MEANING OF PUBLIC POLICY

Not all public policies fall within the public policy exception. Given the narrow approach to the public policy exception, the meaning of ‘public policy’ in the public policy exception is narrower than the ordinary meaning of that phrase.

Most of the restrictions on the scope of the public policy exception are inherent in the nature and characteristics of public policy:

- Territorial/geographical relativity – the public policy exception is confined to the public policies of the enforcement State;
- Temporal/chronological relativity – the public policy exception is confined to public policies that are applicable at the time of the enforcement proceedings;
- Extra-territoriality – the public policy exception is confined to the enforcement State’s public policies that are applicable to transactions involving foreign elements; and
- Fundamentality/essentiality – the public policy exception is confined to the enforcement State’s fundamental public policies.

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<sup>134</sup> See *Interim Report on the Survey relating to the Legislative Implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Note by the Secretariat*, UN GA, 38<sup>th</sup> session, UN Doc A/CN.9/585 (23 May 2005) para 61.

### 2.2.1 Relativity

Public policy is relative in temporal (or chronological) sense and territorial (or geographical) sense.<sup>135</sup> In other words, it varies from time to time, as well as from place to place.

#### (a) *Public policy of the enforcement State*

Despite the territorial relativity of public policy, the public policy exception is confined to the enforcement State's public policies. Article V(2)(b) of the New York Convention expressly refers to 'the country where recognition and enforcement is sought'. This is elaborated in ILA Resolution Rec 2(a):

"A court verifying an arbitral award's conformity with fundamental principles..., should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration."

As previously outlined in Chapter 1, this means that contravention of another State's public policy alone does not justify non-enforcement of an award under the public policy exception. The public policy exception requires contravention of the enforcement State's public policy.<sup>136</sup> However, does this also mean that the enforcement court cannot consider the public policies of other nations when applying the public policy exception?

Essentially, the answer is 'no'. Owing to their overlapping sources and categories, some public policies may transcend places or be upheld in multiple places. Other related provisions in the New York Convention also suggest that judicial inquiry is not confined to the enforcement State's public policies. For instance, the exceptions to enforcement in New York Convention Art V(1) refer to the country whose law governs

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<sup>135</sup> Duncan Miller, 'Public Policy in International Commercial Arbitrations in Australia' (1993) 9 *Arbitration International* 167, 177; Karl-Heinz Bockstiegel, 'Public Policy and Arbitrability' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 179-180; Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 262-263; Andrew Okekeifere, 'Public Policy and Arbitrability under the UNCITRAL Model Law' (1999) 2 *International Arbitration Law Review* 70; TM Yeo, *Choice of Law For Equitable Doctrines* (2004) 41.

<sup>136</sup> See Chapter 1 section 1.3.1(a) – 'Stage one: Is there an applicable public policy?'.

For instance, an award which is illegal in the place of performance of contract or the place of the governing law is not necessarily contrary to the public policy of the enforcement State. See further discussions in Chapter 6 section 6.4 – 'Case study 1: Illegality'.

the arbitration agreement or the arbitral procedure; as well as the country in which, or under whose law, the award is made.

Furthermore, in pursuing the narrow approach to the public policy exception, the enforcement court may use the public policy of another nation to narrow, rather than widen, the scope of the public policy exception. For instance, the enforcement court may require contravention of the public policies of both the enforcement State and the State whose law governs the arbitral procedure.<sup>137</sup>

**(b) Public policy at the time of enforcement**

The temporal sense of relativity means that public policy is constantly changing and evolving.<sup>138</sup> Although judges may not automatically abandon prior decisions based on a past public policy and thereby approach public policy issues anew, they are nevertheless not obliged to assume that a past public policy is ‘sacrosanct’, unable to be overridden by later public policy.<sup>139</sup> This seems to explain the judicial reluctance to define public policy, as well as the consequent inconsistency and uncertainty in the judicial approach to the public policy exception.

In order to promote a narrow and consistent approach to the public policy exception, the ILA favours limiting the public policy exception to public policies which apply at the time when enforcement is sought,<sup>140</sup> rather than at the time when the award is rendered. With respect to public policies which are sourced in legislation, ILA Resolution Rec 3(d) recommends the presumption against the retrospective operation of statutory public policies:

“When a public policy rule of the forum enacted after the rendering of the award prohibits the solution implemented by said award, a court should only refuse the award’s recognition or enforcement if it is plain that the legislator intended the said rule to have effect as regards awards rendered prior to its enactment.”

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<sup>137</sup> See Chapter 6 section 6.5.1 – ‘Due process violation may constitute public policy violation’.

<sup>138</sup> For the various judicial passages on this point, see *Re Jacob Morris (deceased)* (1943) SR NSW 352, 355 (Jordan CJ); *De Santis v Russo* [2001] QSC 65, para 20 (Atkinson J); and *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646, para 84 (citing *Stevens v Keogh* (1946) 72 CLR 1, 28).

<sup>139</sup> *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669, 674 (Cooke P).

<sup>140</sup> ILA Interim Report 228.



This correlates with the rebuttable presumption against retrospective operation of statutes under the Australian common law.<sup>141</sup>

(c) *Narrowing the sources of public policy?*

How does the enforcement court ascertain or verify the existence and content of the alleged public policy? In Australia, the likely sources of public policy are the case law and statute law of Australia, conveniently referred to as ‘national sources’. Apart from precedents (ie the binding nature of case law), persuasive authorities (ie the persuasive nature of case law) are also important. Additional sources may be found in international treaties and conventions that are ratified by Australia, but are yet to be incorporated into Australian law by legislative enactment, conveniently referred to as ‘international sources’.

It can already be seen that national and international sources of public policy may overlap. For instance, an international source would become a national source upon Australia’s legislative implementation of an international treaty which expresses or embodies the public policy. Conversely, a national source may become an international source when Australia enters into an international treaty with other countries to strengthen the protection of their shared public policy. Even in the absence of such a treaty, the public policy may become part of customary international law if it is adhered to by a sufficient number of countries over a sufficient period of time.<sup>142</sup>

The diversity in the sources of public policy stems from, or at least reflects, the relativity and flexibility of public policy. Nonetheless, it seems desirable, if not necessary, to restrict the sources of public policy in order to avoid an unruly or excessively wide approach to the public policy exception. For instance, several US courts require ‘explicit’, ‘well defined and dominant’ public policy which is ‘ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests’.<sup>143</sup>

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<sup>141</sup> See *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

<sup>142</sup> *North Sea Continental Shelf Cases* (Germany v Denmark, Germany v The Netherlands) (1969) ICJ Rep 3.

<sup>143</sup> See US cases on labour arbitration – eg *Muschany v US*, 324 U. 49, 66 (1945); *Drummond Coal Co v United Mine Workers of America*, 748 F 2d 1495, 1499 (11<sup>th</sup> Cir, 1984); *United Paperworkers International Union v Misco Inc*, 484 US 29 (1987); *Eastern Associated Coal Corp v United Mine*

### 2.2.2 Extra-territoriality

Public policy can be ‘territorial’ or ‘extra-territorial’ in scope. The former is intended for domestic transactions or relationships (ie those without any foreign elements).<sup>144</sup> By contrast, the latter is intended for international transactions or relationships (ie those with foreign elements).

Since the New York Convention is confined to foreign awards, the prevailing view is that the public policy exception is confined to the enforcement State’s public policies which have extra-territorial or cross-border application.<sup>145</sup> This attempts to minimise the parochialism or chauvinism inherent in the territorial relativity of public policy. This is because public policies with an extra-territorial scope are usually those which are shared or recognised by other countries, or those which are sufficiently important and transcend the enforcement State’s self-interests. For instance, it would be inappropriate to apply an Australian public policy to an arbitral award which has virtually no connection with Australia, especially when that public policy protects only the Australian public, or disregards the interests of other countries.

Thus implicit in the characteristic of extra-territoriality is the nexus requirement – there must be a sufficient connection between the enforcement State and the arbitral award in order to justify the application of that State’s public policy to that arbitral award. Depending on the circumstances, the mere fact that the enforcement State is the place where one party’s assets are located and therefore where the award is sought to be enforced may suffice.

How does the enforcement court determine whether or not the scope of the alleged public policy is extra-territorial? The answer depends on the sources of that public policy. Where the public policy derives from a national source such as legislation, this would be merely a question of statutory interpretation to be determined under the

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*Workers*, 121 S Ct 462 (2000); *Karaha Bodas Company v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F 2d 936 (Southern District of Texas, 2001).

This leads to the concept of ‘mandatory rules of public policy’ – see Chapter 4.

<sup>144</sup> For a brief explanation of ‘foreign element’, see section 1 of the Introduction (Terminology – ‘International commercial arbitration & foreign arbitral awards’).

<sup>145</sup> See Chapter 1 section 1.3.1(a) for the various judicial expressions of this proposition – eg public policy which applies ‘not only to purely internal matters but even to matters with a foreign element by which other States are affected’; the reasons for non-enforcement must ‘go beyond the minimums which would justify setting aside a domestic judgment or award’.

relevant national law. The enforcement court would ascertain the legislative intention concerning the scope, objectives and importance of the relevant legislation.<sup>146</sup> A public policy may be regarded as having an extra-territorial operation if its embodying legislation can operate extra-territorially. However, owing to the common law presumption against the extra-territoriality of legislation, Australian courts would reach such a conclusion only on the basis of clear legislative expression or necessary implication.<sup>147</sup>

On the other hand, more questions arise where public policy derives from international sources such as international treaties and customs. These questions involve public international law, which is not necessarily part of the enforcement State's domestic law. They include, for instance, treaty interpretation,<sup>148</sup> and determination of whether the relevant public policy has become part of customary international law.

### 2.2.3 Fundamentality

Since public policy pertains to a particular law area and may vary from law area to law area, it must be sufficiently important to justify its extra-territorial application. The characteristic of fundamentality or essentiality is a corollary of the characteristics of territorial relativity and extra-territoriality. For instance, the Hong Kong Court of Final Appeal has confirmed that, for the purposes of the public policy exception, public policy means 'those elements of a State's own public policy which are so fundamental to notions of justice that its courts feel obliged to apply the same not only to purely

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<sup>146</sup> See, eg, *Fitzgerald v Leonhardt Pty Ltd* [1997] HCA 17, which is discussed in Chapter 6 section 6.4 – 'Case study 1: Illegality'.

<sup>147</sup> As stated in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J): "Most statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read as being prima facie restricted in their operation within territorial limits." See also *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 422 (Dixon J).

In addition, *Acts Interpretation Act 1901* (Cth) s 21(1)(b) reflects the common law presumption against extra-territorial application: "references to localities and jurisdictions and other matters and things shall be construed as reference to such localities, jurisdictions and other matters and things in and of the Commonwealth".

<sup>148</sup> See, eg, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

internal matters but even to matters with a foreign element by which other States are affected'.<sup>149</sup>

Yet expressions of the fundamentality concept such as the 'most basic notions of morality and justice',<sup>150</sup> or 'fundamental principles of law and justice'<sup>151</sup> are flexible, ambiguous and 'not very illuminating'.<sup>152</sup> The drafting committee of the New York Convention rejected an earlier version of the public policy exception which used the phrase 'fundamental principles of law'.<sup>153</sup> The United Kingdom and Australian representatives specifically resisted the inclusion of the word 'fundamental' as having 'no clear legal meaning' under their laws.<sup>154</sup> Interestingly, in subsequent debates on the drafting of the public policy exception in the Model Law, some members in the drafting committee of the Model Law maintained that public policy 'meant fundamental principles of law'.<sup>155</sup>

It is thus useful to examine how the courts in various countries have interpreted the phrase 'public policy' in the context of the public policy exception. The following cases demonstrate that the public policy exception does not include all of the enforcement State's political interests, public interests, or mandatory rules. These cases also

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<sup>149</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November (Bokhary PJ).

<sup>150</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 974 (2<sup>nd</sup> Cir, 1974).

<sup>151</sup> *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (New Zealand Court of Appeal).

<sup>152</sup> Diederik De Groot, 'The Impact of the Benetton Decision on International Commercial Arbitration' (2003) 20 *Journal of International Arbitration* 365. See also Joel Junker, 'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards' (1977) *California Western International Law Journal* 228, 231 and 246.

<sup>153</sup> This superseded version of the public policy exception used the expression 'clearly incompatible with public policy or with fundamental principles of law': see *Report of the Committee on the Enforcement of International Arbitral Awards*, UN ESC, 19<sup>th</sup> session, UN Doc E/AC.42/4 (21 March 1955) para 49; *Report of the Committee on the Enforcement of International Arbitral Awards*, UN ESC, 19<sup>th</sup> session, UN Doc E/AC.42.4/Rev.1 (28 March 1955).

<sup>154</sup> See *Report of the Committee on the Enforcement of International Arbitral Awards*, UN ESC, 19<sup>th</sup> session, UN Doc E/AC.42/4 (21 March 1955) para 49; *Committee on the Enforcement of International Arbitral Awards - Summary Record of the 7<sup>th</sup> Meeting*, UN ESC, UN Doc E/AC.42/SR.7 (29 March 1955) paras 4 (UK) and 6 (Australia).

<sup>155</sup> See the Chairman's view in *International Commercial Arbitration*, 318<sup>th</sup> meeting (11 June 1985), UNCITRAL Yearbook XVI (1985) 449 para 38.

exemplify the narrow approach to the public policy exception at stage one of applying the public policy exception.<sup>156</sup>

**(a) Case illustrations**

*Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier* has been frequently cited for its proposition that public policy means the enforcement State's 'most basic notions of morality and justice'.<sup>157</sup> In that case, the defendant submitted that the enforcement of the award would contravene the United States' national policy due to the severance of the American-Egyptian diplomatic relations. The US Court of Appeals for the Second Circuit rejected such attempt to equate 'national policy' with 'public policy', stating that reading the public policy exception as 'a parochial device protective of national political interests' would 'seriously undermine the [New York] Convention's utility':

"[The public policy exception] was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis."<sup>158</sup>

Thus it would seem that the public policy exception may exclude the enforcement State's political interests (such as diplomatic or foreign policies),<sup>159</sup> or at least those which are not sufficiently fundamental (for instance, those that are unrelated to morality and justice). The *Parsons case* also suggests that the US courts may not view trade sanctions and policies (such as embargos, import and export laws) as falling within the public policy exception.<sup>160</sup> However, 'measures of embargo, blockade or boycott' are often cited as examples of public policy.<sup>161</sup>

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<sup>156</sup> Stage one determines whether the alleged public policy can fall within the public policy exception: see the earlier discussions in Chapter 1 section 1.3.1 – 'Stages in the application of the public policy exception'.

<sup>157</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 974 (2<sup>nd</sup> Cir, 1974).

<sup>158</sup> *Ibid.* The *Parsons case* was followed and applied in *Belship Navigation Inc v Sealift Inc*, United States District Court (Southern District of New York), 27 July 1995, extract in Yearbook Commercial Arbitration XXI (1996) 799 (the *Belship case*).

<sup>159</sup> ILA Interim Report 236.

<sup>160</sup> The *Parsons case* and the *Belship case* concern trade sanctions against Egypt and Cuba respectively. See also *National Oil Corporation v Libyan Sun Oil*, 733 F Supp 800 (D. Del, 1990).

Similarly, not all public interests (or ‘*ordre publique*’<sup>162</sup>) can fall within the public policy exception, even though most public policies derive from, or reflect, public interests. In *Amaltal Corporation v Maruha (NZ) Corporation Ltd*, the New Zealand Court of Appeal held that the ‘penalty rule’ (under which a penalty clause in a contract is unenforceable) ‘is not a matter of the public policy of New Zealand’ within the meaning of the public policy exception in Model Law Art 34:<sup>163</sup>

“the rule, which certainly is one developed in the public interest, is concerned with relief against oppression or unconscionable behaviour by a contracting party... It is not a rule which can properly be characterised as so fundamental as to constitute ‘public policy’ in the sense in which those words have been used in Art 34...”<sup>164</sup>

The *Amaltal* case is an example of using fundamentality as a criterion for determining whether an alleged public policy can fall within the public policy exception.<sup>165</sup>

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According to ‘The public policy exception to the recognition and enforcement of foreign arbitral awards’ (December 2004) Quinn Emanuel, 11-12, one of the reasons for excluding trade regulations from the public policy exception is because such regulations ‘generally do not proscribe conduct that is, in and of itself, offensive to basic notions of morality and justice, but rather conduct that is, at the moment, considered improper’. Reciprocity is another reason: “If a country elevates its individual trade policy to the level of ‘public policy’, it cannot expect other nations to ignore their own trade regulations. Such an approach invites the same kind of parochialism that the New York Convention was designed to prevent.”

<sup>161</sup> See, eg, ILA Final Report 256.

<sup>162</sup> Geoffrey Hartwell, “The New York Convention of 1958: A Basis for a Supra-National Code?” <[http://www.hartwell.demon.co.uk/nyc\\_asa.htm](http://www.hartwell.demon.co.uk/nyc_asa.htm)> at 31 May 2004.

<sup>163</sup> *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614, para 66.

<sup>164</sup> *Ibid*, para 59.

Model Law Art 34(2)(b)(ii) is the public policy ground for annulment (rather than non-enforcement) of arbitral awards. For a brief explanation on the distinction and interaction between annulment and non-enforcement, see section 3 of the Introduction (Terminology – ‘Recognition, enforcement, annulment’). For further discussions, see Chapter 5 section 5.4.3 – ‘Article V(2)(b) & (1)(e): Non-enforcement & Annulment of arbitral awards’.

<sup>165</sup> See also *A Halcoussis Shipping Ltd v Golden Eagle Liberia Ltd*, 1989 WL 115941 (SDNY 1989), in which the US court held that the doctrine of laches did not represent the type of ‘fundamental public policy’ contemplated by the New York Convention. To elevate that doctrine to this level ‘required something more than showing that there are good reasons for the doctrine’s existence’ (ie more than the policy considerations underlying the laches doctrine).

Another example is *Waterside Ocean Navigation Co Inc v International Navigation Ltd*, 737 F 2d 150 (2<sup>nd</sup> Cir, 1985). Unlike the policy against perjury, the policy against inconsistent testimonies does not fall within the public policy exception. For the US Court of Appeal, the assertion that this policy is one of United States’ most basic notion of morality and justice ‘goes much too far’.

The Korean Supreme Court adopted a comparable approach in *Adviso NV v Korea Overseas Construction Corp.*<sup>166</sup> It held that violation of Korea's mandatory rules, specifically the foreign limitation period, did not necessarily render the enforcement of the award in violation of Korea's public policy:

“When foreign legal rules applied in an arbitral award are in violation of mandatory provisions of Korean law, such a violation does not necessarily constitute a reason for refusal. Only when the concrete outcome of recognising such an award is contrary to the [fundamental] morality and other social order of Korea, will its recognition and enforcement be refused.”<sup>167</sup>

This raises two points. Firstly, not all mandatory rules of the enforcement State can fall within the public policy exception, as not all of them are ‘fundamental’ rules of public policy.<sup>168</sup> This relates to the first stage in the application of the public policy exception, which is essentially a characterisation process of whether an alleged public policy is ‘public policy’ within the meaning of the public policy exception.

Secondly, even if the alleged mandatory rule can be characterised as ‘public policy’ for the purposes of the public policy exception, an award's violation of such mandatory rule does not necessarily render that award unenforceable under the public policy exception. It is the enforcement of an award, rather than that award itself, which must violate the enforcement State's public policy.<sup>169</sup>

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<sup>166</sup> *Adviso NV v Korea Overseas Construction Corp*, Supreme Court of Korea, 14 February 1995, extract in Yearbook Commercial Arbitration XXI (1996, Korea No. 3) <<http://www.kluwerarbitration.com>> at 18 November 2003.

<sup>167</sup> Ibid, extract paras 9 and 10.

See also *Inter Maritime Management SA v Russin & Vecchi*, Tribunal Federal (Swiss Supreme Court), 9 January 1995, extract in Yearbook Commercial Arbitration XXII (1997, Switzerland No. 28), para 23 <<http://www.kluwerarbitration.com>> at 8 February 2005: “substantive public policy is not necessarily violated where the foreign provision is contrary to a mandatory provision of Swiss law.”

<sup>168</sup> Chapter 4 explores the extent to which mandatory rules may fall within the public policy exception.

<sup>169</sup> Chapter 6 section 6.4 elaborates on this point, which relates to stage two (and even stage three) of applying the public policy exception.

**(b) International public policy?**

The combination of the concepts of fundamentality and extra-territoriality means that the public policy exception is confined to the enforcement State's 'international public policy'. This is the essence of the narrow approach to the public policy exception – the use of the distinction between domestic and international public policies to 'accept a public policy violation in extreme cases only'.<sup>170</sup>

The ILA Resolution endorses international public policy as the test for determining the enforceability of foreign awards.<sup>171</sup> It recommends a narrow definition of international public policy to ensure that public policy is 'rarely a ground of refusing enforcement of international arbitral awards'.<sup>172</sup>

Accordingly, the ILA Resolution divides 'international public policy' into three categories, two of which are the 'fundamental principles' that the enforcement State wishes to protect even when it is not directly concerned, and the rules designed to serve the enforcement State's 'essential political, social or economic interests'.<sup>173</sup> It uses the concept of fundamentality to narrow the meaning of 'international public policy' and therefore the scope of the public policy exception. However, the ILA's approach to determining whether an alleged public policy is sufficiently fundamental may obscure the distinction between international public policy and other categories of public policy, especially transnational public policy.<sup>174</sup> Before exploring the domestic-international-transnational categorisation of public policy in Chapter 3, it is convenient to examine another method of categorising public policy – namely, the substance-procedure distinction.

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<sup>170</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 268.

<sup>171</sup> See ILA Resolution Rec 1(b).

<sup>172</sup> ILA Final Report 253.

<sup>173</sup> ILA Resolution Rec 1(d).

<sup>174</sup> For a brief explanation of these categories of public policy, see section 5(a) of the Introduction (Terminology – 'Categories of public policy').



## 2.3 SUBSTANTIVE & PROCEDURAL PUBLIC POLICIES

‘Substantive public policy’ concerns the result of arbitration whereas ‘procedural public policy’ concerns the process of arbitration.<sup>175</sup> The former ‘goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award’, whereas the latter ‘goes to the process by which the dispute was adjudicated’.<sup>176</sup>

Examples of substantive public policy include prohibitions against abuse of rights,<sup>177</sup> uncompensated expropriation, discrimination, and activities that are *contra bonos mores*;<sup>178</sup> as well as the principles of good faith and *pacta sunt servanda*.<sup>179</sup>

On the other hand, an arbitral award may violate procedural public policy if it is made by arbitrators who are biased or partial, if it is tainted by perjury, fraud or corruption, if it breaches the principles of due process, or if it is inconsistent with a binding judicial decision.<sup>180</sup>

### 2.3.1 Refining the substance-procedure distinction

The above examples demonstrate that the substance-procedure distinction can be used in the context of, or in conjunction with, both public policy and arbitral award. In other words, the distinction may refer to either the types of public policy, or the different components in the arbitral award which violate public policy. This leads to the following attempt at clarifying the ILA’s reference to the substance-procedure distinction in the ILA Resolution.

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<sup>175</sup> See the relevant definitions in section 5(a) of the Introduction. The civil law terminology for substantive public policy is ‘*ordre public au fond*’.

<sup>176</sup> ILA Interim Report 230.

<sup>177</sup> ILA Resolution Rec 1(e).

<sup>178</sup> ‘*Contra bonos mores*’ means ‘contrary to good morals or public order’: ILA Interim Report 235. Examples include piracy, terrorism, genocide, slavery, smuggling, drug trafficking and paedophilia: ILA Final Report 256.

<sup>179</sup> ‘*Pacta sunt servanda*’ means that a contract or treaty should be enforced and performed in good faith: see *Vienna Convention on the Law of Treaties* Art 26; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) para 18-57.

For other examples of substantive public policy, see ILA Final Report 256.

<sup>180</sup> ILA Resolution Rec 1(e); ILA Final Report 256.

- Substantive vs procedural **public policies**: A public policy which would be violated by enforcing an award may be either substantive or procedural in nature. This is reflected in ILA Resolution Rec 1(e):

“An example of a substantive fundamental principle is prohibition of abuse of rights. An example of procedural fundamental principle is the requirement that tribunals must be impartial.”

- Substantive vs procedural **violations of public policy**: A public policy may be violated by the remedies awarded or orders made by an arbitrator (substantive violation), or by the arbitrator’s conduct in the arbitral proceedings (procedural violation). This seems to be the intention of ILA Resolution Rec 1(c):

“when recognition and enforcement of said award would entail their violation on account of either of the procedure pursuant to which it was rendered (procedural public policy) or of its contents (substantive public policy).”

The substance-procedure distinction is relatively non-controversial, since contravention of either substantive or procedural public policy may fall within the public policy exception. Nonetheless, two noteworthy implications arise from this distinction. The first is the increasing equivalence between the common law concept of ‘public policy’ and the civil law concept of ‘*ordre public*’.<sup>181</sup> The second implication is the possible overlap between the public policy exception and the ‘due process exception’ to enforcement.<sup>182</sup>

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<sup>181</sup> See section 2.3.2 of this Chapter – ‘Public policy vs *Ordre public*’.

<sup>182</sup> See section 2.3.3 of this Chapter – ‘Public policy & due process exceptions to enforcement’.

### 2.3.2 Public policy vs *Ordre public*

The common law concept of ‘public policy’ has traditionally been viewed as narrower than the civil law concept of ‘*ordre public*’ because it did not include matters of procedural law.<sup>183</sup> This sparked fierce debate on the wording of Model Law Art 34(2)(b)(ii), which is the public policy ground for setting aside an award. The United Kingdom representative persistently expressed concerns that the wording ‘public policy’ may not cover ‘serious procedural injustice’.<sup>184</sup> Representatives from other countries shared these concerns, some even suggested the deletion of ‘public policy’ for being ‘much too vague’.<sup>185</sup> However, the majority view was against departing from the New York Convention, and therefore in favour of retaining the reference to public policy ‘without amplification in the text’.<sup>186</sup> Moreover, the representatives could not agree on the precise wording for procedural public policy. The Australian representative suggested ‘fundamental principles of justice’, while other formulations included ‘natural justice’, ‘due process’, ‘fundamental principles of procedure’ and ‘procedural fairness’.<sup>187</sup>

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<sup>183</sup> Christoph Liebscher, ‘European Public Policy - A Black Box?’ (2000) 17 *Journal of International Arbitration* 73, 74; Audley Sheppard, ‘Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard?’ (2003) 1 *Oil, Gas & Energy Law Intelligence*, 4; Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration* (2003) 26; Fernando Mantilla-Serrano, ‘Towards a Transnational Procedural Public Policy’ (2004) *Arbitration International* 333.

In the *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v Sweden) [1958] ICJ 55, 90-91, Judge Sir Hersch Lauterpacht commented that the use of *ordre public* ‘is not used as implying a substantial difference between it and the notion of public policy’, although *ordre public* ‘is somewhat wider’.

<sup>184</sup> See *International Commercial Arbitration*, 317<sup>th</sup> meeting (11 June 1985), UNCITRAL Yearbook XVI (1985) 446, paras 4 and 36; *International Commercial Arbitration*, 318<sup>th</sup> meeting (11 June 1985), UNCITRAL Yearbook XVI (1985) 449, para 41; *International Commercial Arbitration*, 324<sup>th</sup> meeting (14 June 1985), UNCITRAL Yearbook XVI (1985) 474, paras 21-22.

<sup>185</sup> See, eg, *International Commercial Arbitration*, 318<sup>th</sup> meeting (11 June 1985), UNCITRAL Yearbook XVI (1985) 449, paras 34 (India), 36 (Yugoslavia), 37 (Iraq), 39 (Nigeria), 43 (France), 44 (Singapore) and 55 (Sierra Leone).

<sup>186</sup> See *International Commercial Arbitration*, 318<sup>th</sup> meeting (11 June 1985), UNCITRAL Yearbook XVI (1985) 449, para 56; *International Commercial Arbitration*, 330<sup>th</sup> meeting (19 June 1985), UNCITRAL Yearbook XVI (1985) 497, para 11.

<sup>187</sup> See *International Commercial Arbitration*, 324<sup>th</sup> meeting (14 June 1985), UNCITRAL Yearbook XVI (1985) 474, paras 22 (UK), 23 (Argentina) and 36 (Australia).

Ultimately the drafting committee of the Model Law recommended the explanation that the expression ‘public policy’ means ‘fundamental principles of law, without differentiating between substantive and procedural law’. It specifically recommended that public policy should cover ‘cases of fraud, corruption, and other serious violations of procedure’.<sup>188</sup> Accordingly, Australia has enacted *International Arbitration Act 1974* (Cth) s 19:

“it is hereby declared, for the avoidance of any doubt, that, for the purposes of [Arts 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law], an award is in conflict with the public policy of Australia if: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.”

This provision confirms that the public policy exception extends to procedural public policies. Despite the express reference to the Model Law’s public policy exceptions in IAA s 19, Australian courts may extend s 19 to the public policy exceptions in the New York Convention and IAA. This is because the public policy exceptions in the Model Law mirror the New York Convention’s public policy exception.

Consequently, the terms ‘public policy’ and ‘*ordre public*’ are frequently used interchangeably and increasingly regarded as synonymous.<sup>189</sup> Yet it is questionable as to whether and to what extent ‘*ordre public*’ still remains wider than public policy’ today.<sup>190</sup>

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<sup>188</sup> Ibid, para 57.

<sup>189</sup> ILA Final Report 251; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 359; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 179.

Another reason why public policy was previously considered to be narrower than *ordre public* is its restriction to ‘clearly acknowledged subject headings’: see, eg, Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) 566; Duncan Miller, ‘Public Policy in International Commercial Arbitrations In Australia’ (1993) 9 *Arbitration International* 167, 176.

This was partly due to the traditional narrow view against judicial law-making – ie judges should not create new heads of public policy. However, some courts have departed from this view in order to give affect to the relative and dynamic nature of public policy. For instance, in *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705, the Indian Supreme Court said: “If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy.”

<sup>190</sup> See, eg, Christoph Liebscher, ‘European Public Policy - A Black Box?’ (2000) 17 *Journal of International Arbitration* 73, 77 (footnote number 4).

### 2.3.3 Public policy & due process exceptions to enforcement

The inclusion of procedural public policy also confirms the possibility that the same conduct may fall within both the public policy exception (ie New York Convention Art V(2)(b) and IAA s 8(7)(b)) and the ‘due process exception’ to the enforcement of arbitral awards (ie New York Convention Art V(1)(b) and IAA s 8(5)(b)).<sup>191</sup> For instance, ‘breach of the rules of natural justice’ (as referred to in IAA s 19) such as the parties’ inability to present their case due to the lack of proper notice or the arbitrators’ lack of impartiality, may render their awards unenforceable under both exceptions. Chapters 5 and 6 further explore the interaction between these two distinct but related exceptions to the enforcement of foreign arbitral awards.<sup>192</sup>

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<sup>191</sup> Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 149.

<sup>192</sup> See Chapter 5 section 5.4.2 (‘Art V(2)(b) & (1)(b): Public policy & Due process’) and Chapter 6 section 6.5.1 (‘Due process violation may constitute public policy violation’).

It is interesting to note that Art 9(e) of the *Convention on Choice of Court Agreements* (concluded 30 June 2005) expressly includes procedural public policies of the enforcement State: “recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State”.

## 2.4 CONCLUSIONS

The public policy exception includes both substantive and procedural public policies. It concerns both the arbitral awards and the arbitral processes. Consequently, the traditional distinction between the common law concept of public policy and the civil law concept of *ordre public* no longer exists, or is no longer problematic.

Yet the phrase ‘public policy’ has a narrower meaning in the public policy exception. It is confined to ‘really fundamental conceptions of the legal order’<sup>193</sup> of the enforcement State, which transcend national borders and remain applicable at the time of the enforcement proceedings. The diversity in the terminologies and sources of public policy reflects the relativity of public policy. The extra-territoriality of public policy is apparently based on, or justified by, the fundamentality of public policy, as well as the nexus between the enforcement State and the arbitral award. These characteristics, while intending to narrow the meaning of public policy for pro-enforcement purposes, are nevertheless not immune from difficulties in their application. These characteristics also explain why public policy has been likened to an unruly horse for almost two centuries.

The next Chapter examines the use of ‘international public policy’ to narrow the scope of the public policy exception in deference to the New York Convention’s pro-enforcement policy. Can the domestic-international-transnational categorisation of public policy keep the unruly horse in control? Or has it in fact turned the public policy exception into an unruly horse?

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<sup>193</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 498.

### CHAPTER 3

## GREETING THE UNRULY HORSE – THE ‘INTERNATIONAL PUBLIC POLICY’ EXCEPTION

### 3.1 INTRODUCTION

The essence of the narrow approach to the public policy exception is that only the enforcement State’s international public policies are applicable.<sup>194</sup> ‘International public policy’ is public policy which applies ‘not only to purely internal matters but even to matters with a foreign element by which other States are affected’.<sup>195</sup> It applies ‘in the field of private international law’.<sup>196</sup> It remains the prevailing test for determining the enforceability of foreign awards, since ‘domestic public policy’ is too broad while ‘transnational public policy’ may not pertain to the enforcement State.<sup>197</sup>

Unfortunately neither the concept nor the current definition of international public policy is immune from problems. This is because the current categorisation of public policy as domestic, international, multinational and transnational is imprecise.

This Chapter identifies the main difficulties with the current categorisation of public policy through its attempt to differentiate or reconcile those overlapping categories of public policy. It demonstrates the need to avoid using those categories to define the scope of the public policy exception. In order to prevent the public policy exception and its application from becoming an unruly horse, it is necessary to clarify and re-express the concept of international public policy. This approach is more conservative but more workable than the drastic alternative of abolishing the existing categories of public policy, since the ILA Resolution recommends international public policy as the applicable test for the public policy exception.

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<sup>194</sup> See the preceding discussions in Chapter 2 section 2.2.3(b) – ‘International public policy’.

<sup>195</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Bokhary PJ).

<sup>196</sup> *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22, para 39) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>197</sup> For a brief definition of these categories of public policy, see section 5(a) of the Introduction (Terminology – ‘Categories of public policy’).

### 3.2 DECIPHERING THE CURRENT CATEGORISATION OF PUBLIC POLICY

The national-multinational-transnational categorisation is seemingly based on the public policies' sources, scope and fields of operation.

'**National public policy**' pertains to a particular nation. It may apply territorially to transactions which do not involve any foreign element (ie '**domestic public policy**' or '*ordre public interne*'), or it may apply extra-territorially to transactions involving foreign elements (ie '**international public policy**' or '*ordre public international*'). Common examples of national public policy include prohibitions against fraud, corruption, undue influence, discrimination and procedural unfairness.<sup>198</sup>

On the other hand, '**multinational public policy**' belongs to a group of nations and often reflects the interests jointly shared within that group. Examples include the 'European public policy' of the European Union,<sup>199</sup> and the public policy of the Muslim countries as expressed in the Shari'ah.<sup>200</sup>

'**Transnational public policy**' concerns the entire international community and may therefore be capable of universal application. It comprises the fundamental rules of natural law, the principles of universal justice, *jus cogens* (or peremptory norms) in public international law,<sup>201</sup> and the general principles of morality accepted by civilised nations.<sup>202</sup> Thus it is also known as 'public policy based on international customs and

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<sup>198</sup> For other examples of national public policy, see Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 723; Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) 533-534 para 405.

<sup>199</sup> See *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, which is discussed in section 3.5 of this Chapter – 'Multinational public policy'.

<sup>200</sup> Loukas Mistelis, 'Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2 *International Law Forum Du Droit International* 248, 251.

The Shari'ah is the Islamic law applied to Muslim countries to disputes involving Muslims. It contains general principles such as good faith in the performance of obligations, and the observance of due process in dispute settlement: see Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) para 2-67.

<sup>201</sup> Article 53 of the *Vienna Convention on the Law of Treaties* defines '*jus cogens*' as 'a norm accepted and recognised by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

<sup>202</sup> See ILA Final Report 259; Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) 534-535 para 407; Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 192.



international law'.<sup>203</sup> Prohibitions against slavery, racial discrimination, terrorism, destruction of cultural heritage and violation of fundamental human rights also exemplify transnational public policy.<sup>204</sup>

It has been suggested that while the existence and content of national and multinational public policies may be identifiable, the existence and effect of international and transnational public policies remain debatable.<sup>205</sup> This is because the word 'international' in the context of international public policy is a misnomer<sup>206</sup> – it somewhat differs from its literal or ordinary meaning. For instance, international public policy is 'national' because it is a sub-category of national public policy. It is 'transnational' because it applies to transactions that have connections with other nations. Yet it differs from transnational public policy because it falls short of being 'truly international',<sup>207</sup> 'really international'<sup>208</sup> and 'genuinely international'!<sup>209</sup> The diversity of terminology in the categorisation of public policy explains why public policy remains an unruly horse in the realm of arbitration.

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<sup>203</sup> Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 181-182.

<sup>204</sup> Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) 534-535 para 407; Hans van Houtte, 'From a National to a European Public Policy' in James Nafziger and Symeon Symeonides (eds), *Law & Justice in a Multistate World – Essays in Honour of Arthur T Von Mehren* (2002) 841, 846.

<sup>205</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 422 para 17-33.

<sup>206</sup> Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) 534 para 405; Diederik De Groot, 'The Impact of the Benetton Decision on International Commercial Arbitration' (2003) 20 *Journal of International Arbitration* 365; 'Transnational (or Truly International) Public Policy and International Arbitration' in *ICCA Congress Series No. 3* (1986) 258 para 3.

<sup>207</sup> Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) 534-535 para 407; Gary Born, *International Commercial Arbitration* (2<sup>nd</sup> ed, 2001) 826; AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 98; Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 110 para 4.02.

<sup>208</sup> Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 259, 311.

<sup>209</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 863 para 1535.

### 3.2.1 Why international public policy?

The drafters of the Model Law deliberately refrained from using international public policy, as they considered such a term ‘lacked precision’ and that ‘its underlying idea was not generally accepted’.<sup>210</sup> However, the ILA now regards international public policy as ‘sufficiently well established to be used as the test of enforceability’,<sup>211</sup> and offers its definition of international public policy to promote greater judicial consistency. There are three main reasons for the ILA’s endorsement of international public policy.

Firstly, the ILA’s survey of case law reveals sufficient judicial acceptance of the distinction between domestic and international public policies.<sup>212</sup> Some countries’ arbitration legislation also recognises international public policy.<sup>213</sup> Implicit (and even explicit) in such recognition is the questionable assumption that international public policy is narrower than domestic public policy.<sup>214</sup>

Secondly, international public policy narrows the scope of the public policy exception and thereby accords with the pro-enforcement policy of the New York Convention.

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<sup>210</sup> Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990) 199-200.

One of the superseded drafts of the public policy exception in Model Law Art 36 referred to ‘the [international] public policy of this State’: see *Note by the Secretariat: Model Law on International Commercial Arbitration: Draft Articles 37 to 41 on Recognition and Enforcement of Award and Recourse Against Award*, UN Doc A/CN.9/WG.II/WP.42 (25 January 1983), UNCITRAL Yearbook XIV (1983) 91.

<sup>211</sup> ILA Final Report 252 (footnote number17).

<sup>212</sup> ILA Final Report 227 cites *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969 (2<sup>nd</sup> Cir, 1974); *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22) <<http://www.kluwerarbitration.com>> at 26 July 2004; and *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003.

<sup>213</sup> See ILA Final Report 251; Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 498 for the relevant legislation in France, Portugal, Algeria, and Lebanon.

<sup>214</sup> ILA Interim Report 220 and 226; R Fathallah, ‘International Law Association Resolution on the Application of Public Policy as a Ground for Challenging Arbitral Awards’ (2003) 16(2) *White & Case International Dispute Resolution* 3, 3-4.

See further discussions in section 3.3.1 of this Chapter – ‘Challenging the domestic-international dichotomy’.

However, this reason assumes that international public policy is sufficiently or appropriately narrow. This thesis will continuously question whether international public policy, as currently defined, represents an appropriate balance between the competing interests in international commercial arbitration.

Thirdly, the ILA has noted that there is inadequate judicial support for transnational public policy.<sup>215</sup> However, this Chapter will examine the desirability and feasibility of applying transnational public policy in conjunction with, or as an exception to, international public policy.<sup>216</sup>

### 3.2.2 ILA's categories of international public policy

Before exploring the interaction between international public policy and other categories of public policy, it is useful to outline the ILA's three categories of international public policy.<sup>217</sup> These categories are not mutually exclusive.<sup>218</sup>

Firstly, '**fundamental principles**' pertain to 'justice or morality' that an enforcement State 'wishes to protect even when it is not directly concerned',<sup>219</sup> since they are considered to be 'sufficiently fundamental' within that State's 'own legal system'.<sup>220</sup> This category endorses the concept of fundamentality as discussed in Chapter 2.<sup>221</sup>

Secondly, '**public policy rules**' serve the enforcement State's 'essential political, social or economic interests'.<sup>222</sup> They differ from 'mere mandatory rules' which do not bar enforcement of arbitral awards.<sup>223</sup>

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<sup>215</sup> ILA Final Report 259.

For instance, in *Fougerolle v Procofrance* (1990) Rev. Arb. 892, the Paris Court of Appeal in France expressed a degree of scepticism in relation to applying transnational public policy.

<sup>216</sup> See section 3.6.6 of this Chapter – 'Revisiting transnational public policy'.

<sup>217</sup> Recommendation 1(d) of the ILA Resolution introduces the three categories of international public policy, with examples in Recommendation 1(e). Recommendations 2 to 4 then provide more detailed provisions pertaining to each category.

<sup>218</sup> ILA Resolution Rec 1(e).

<sup>219</sup> ILA Resolution Rec 1(d)(i).

<sup>220</sup> ILA Resolution Rec 2(a).

<sup>221</sup> See Chapter 2 section 2.2.3 – 'Fundamentality'.

<sup>222</sup> ILA Resolution Recs 1(d)(ii) and 3(d).

<sup>223</sup> ILA Resolution Rec 3(a).

Chapter 4 explores the distinction and interaction between public policy and mandatory rules.

Thirdly, ‘**international obligations**’ are ‘obligations towards other States or international organisations’ which the enforcement State has a duty to respect.<sup>224</sup> They include United Nations resolutions imposing sanctions and international conventions ratified by the enforcement State.<sup>225</sup> This category of international public policy represents and reinforces the overlap between international public policy and transnational public policy.<sup>226</sup>

By comparing and contrasting international public policy with domestic public policy and then with transnational public policy, the following sections explore why international public policy is itself unruly, and may even render the public policy exception more unruly.

### 3.3 INTERNATIONAL vs DOMESTIC PUBLIC POLICIES

The following table summarises the main differences and similarities between international public policy and domestic public policy.

	<b>International</b>	<b>Domestic</b>
<b>Differences</b>	Extra-territorial scope – applies to transactions with foreign elements	Territorial scope – applies to transactions without foreign elements
	Part of a law area’s private international law	Part of a law area’s domestic private law
	Judges may consider other law areas’ public policies (comparative element)	Judges consider their law area’s public policy only (no comparative element)
<b>Similarities</b>	<ul style="list-style-type: none"> <li>▪ Sub-categories of national public policy pertaining to the same law area</li> <li>▪ Same variety of national and international sources<sup>227</sup></li> </ul>	

<sup>224</sup> ILA Resolution Recs 1(d)(iii) and 4.

<sup>225</sup> ILA Resolution Rec 1(e); ILA Final Report 257.

<sup>226</sup> See further discussions in section 3.4 of this Chapter – ‘International vs Transnational public policies’.

<sup>227</sup> As discussed Chapter 2 section 2.2.1(c), ‘national sources’ include statute and case law whereas ‘international sources’ include international treaties and customs. These two types of sources may merge. For instance, an international treaty may become part of a nation’s national law upon that nation’s legislative adoption and implementation of that treaty.

### 3.3.1 Challenging the domestic-international dichotomy

As can be seen from the above table, the main difference between international and domestic public policies lies in their territorial scope and field of operation. This leads to the following assumptions or observations, some of which are doubtful.

#### (a) *International public policy is national not international*

International public policy is ‘national’ in the sense that it is part of a law area’s national public policy, and is therefore sanctioned by the judges in that law area.<sup>228</sup>

However, the word ‘international’ in the context of international public policy means that this category of public policy operates within a law area’s private international law because it applies to transactions with foreign elements.<sup>229</sup> Accordingly, international public policy is also known as public policy ‘in the sense of private international law’,<sup>230</sup> or ‘as applied in the field of private international law’.<sup>231</sup> By contrast, domestic public policy applies in the field of domestic private law, since it applies to transactions without foreign elements and therefore do not invoke any rules of private international law.

While this assumption appears acceptable, avoidance of the word ‘international’ is still desirable in order to avoid some of the ambiguities inherent in the national-international interrelationship.<sup>232</sup>

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<sup>228</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 360; Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (2002) 521.

<sup>229</sup> Hans van Houtte, ‘From a National to a European Public Policy’ in James Nafziger and Symeon Symeonides (eds), *Law & Justice in a Multistate World – Essays in Honour of Arthur T Von Mehren* (2002) 841, 884.

As previously mentioned in the Introduction (Terminology – ‘National, law, private international law, public international law’), a law area’s national law comprises of ‘private international law’ and ‘domestic private law’. The main objective of private international law is to determine which law area’s domestic private law will govern the relevant transaction.

<sup>230</sup> AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 97.

<sup>231</sup> *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22, para 39) <<http://www.kluwerarbitration.com>> at 26 July 2004; ILA Final Report 251-252.

<sup>232</sup> For further discussions, see sections 3.3.2 (‘Challenges arising from the domestic-international dichotomy’) and 3.6.1 (‘Avoiding misnomers’) of this Chapter.

**(b) *International public policy is part of or narrower than domestic public policy***

It has been suggested that, since international public policy is part of domestic public policy, the former is necessarily narrower than the latter.<sup>233</sup> Yet both components of this assumption are questionable.

Some domestic and international public policies inevitably overlap as they are part of a law area's national public policy. Examples such as competition, insurance, employment, anti-discrimination and planning laws are all capable of representing both categories of public policy. However, it does not necessarily follow that these categories of public policy are part of each other. It would be more accurate to say that international public policy can be, but need not be, part of domestic public policy.

In addition, there are no plausible reasons why international public policy is narrower than domestic public policy. Some scholars even suggest that international public policy can be wider. For instance, the rules and policies concerning foreign investment apply only to international transactions.<sup>234</sup> The statement that, 'what pertains to public policy in domestic cases is not necessarily to be regarded as pertaining to public policy in international cases',<sup>235</sup> does not necessarily mean that domestic public policy is wider than international public policy. It simply suggests that the two categories of public policy may not apply to the same situations. The focus should be on the circumstances and context of these public policies' application, rather than on the width of their scope.

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<sup>233</sup> See, eg, *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in *Yearbook Commercial Arbitration* XX (1995, India No. 22, para 29) <<http://www.kluwerarbitration.com>> at 26 July 2004.

For other expressions of this view, see ILA Final Report 252; Christopher Kuner, 'The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention' (1990) 7 *Journal of International Arbitration* 71, 89-90; Loukas Mistelis, 'Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2 *International Law Forum Du Droit International* 248, 250-251; Hrvoje Sikiric, 'Arbitration and Public Policy: Arbitration proceedings and Public Policy' (2000) 7 *Croatian Arbitration Yearbook* 85, 87; Philip Daniels, *Analyse the Role of Public Policy as a Ground for Opposing Recognition and Enforcement of International Arbitration Awards in the New York Convention and Model Law* (LLM Thesis, University of Queensland, 1994) 18; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 360; Andrew Okekeifere, 'Public Policy and Arbitrability under the UNCITRAL Model Law' (1999) 2 *International Arbitration Law Review* 70, 70-71; AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 97.

<sup>234</sup> ILA Interim Report 232.

<sup>235</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 382.

However, the debate is likely to persist, since the assumption that international is narrower than domestic has been extended to mandatory rules. For instance, it has been said that rules which are mandatory in the sense of private international law should also be mandatory in a domestic context, but the opposite is not always true.<sup>236</sup> This additional layer of complexity reflects the overlap between public policy and mandatory rules. As Chapter 4 will show, the primary cause of confusion is that the distinction between '*ordre public interne*' and '*ordre public international*' has been translated as the distinction between 'domestic public policy' and 'international public policy', as well as the distinction between 'domestically (or domestic) mandatory rules' and 'internationally (or international) mandatory rules'.<sup>237</sup>

(c) *International public policy is overriding or more important*

There are various expressions of this view, most of which are premised on the extra-territorial scope of international public policy. These include: 'international public policy is at the heart of domestic public policy, a rule which is not even a matter of domestic public policy could not be considered as belonging to international public policy',<sup>238</sup> domestic public policy represents a nation's 'basic notions of morality and justice' whereas international public policy represents a nation's 'most basic notions of morality and justice';<sup>239</sup> international public policy is at 'a higher level of abstraction' and usually trumps domestic public policy where the two conflict;<sup>240</sup> 'international public policy represents that part of public policy which is more vital for the legal system, its principles which are more jealously adhered to and which cannot be affected by the access into that legal system of a foreign provision (or decision) which conflicts with them'.<sup>241</sup>

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<sup>236</sup> AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 97.

<sup>237</sup> Ibid, 98. See further discussions in Chapter 4 section 4.2.1 – '*Ordre public* – Public policy and/or mandatory rules'.

<sup>238</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 954 para 1647.

<sup>239</sup> Philip Daniels, *Analyse the Role of Public Policy as a Ground for Opposing Recognition and Enforcement of International Arbitration Awards in the New York Convention and Model Law* (LLM Thesis, University of Queensland, 1994) 18.

<sup>240</sup> Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (2002) 392.

<sup>241</sup> Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2<sup>nd</sup> ed, 2001) 506 para 18.4.

However, the mere fact that international public policy applies to international transactions (ie those with foreign elements) rather than domestic transactions (ie those without foreign elements) does not explain its greater importance. Moreover, a comparative evaluation of the importance of domestic and international public policies is difficult, if not undesirable. In spite of their overlap, these two categories of public policy target different circumstances and operate in different fields.

The assumption that international public policy is more important nevertheless acknowledges that fundamentality is one of the criteria for defining the scope of the public policy exception. As discussed earlier,<sup>242</sup> the public policy applicable to determining the enforceability of foreign arbitral awards must be sufficiently fundamental to justify its extra-territorial operation, especially in light of the territorial relativity of public policy. However, some domestic public policies ‘represent important local policies and are not merely instances of parochial or homeward bound attitudes’.<sup>243</sup>

This leads to the question of whether international public policy does (and should) prevail over domestic public policy in the event of conflict. This is one of the challenges created by these two different but overlapping sub-categories of national public policy.

### **3.3.2 Challenges arising from the domestic-international dichotomy**

As public policies may change from time to time, conflicting public policies within a law area are foreseeable. In the context of the judicial enforcement of foreign arbitral awards, international public policy would prevail over any conflicting domestic public policy simply because the latter is inapplicable. The differences in their scope and field of operation resolve, and even avoid, any conflicts between international and domestic public policies. Yet a complete avoidance of such conflicts depends on a clear demarcation between these two categories of public policy. This is yet to be achieved, at least in Australia.

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<sup>242</sup> See Chapter 2 section 2.2.3 – ‘Fundamentality’.

<sup>243</sup> Michael Pryles, ‘Internationalism in Australian Private International Law’ (1989) 12 *Sydney Law Review* 96, 113.



The distinction between *ordre public interne* and *ordre public international* is relatively well-established in Europe. For instance, the courts in Germany, Luxembourg, Italy and Switzerland expressly apply international public policy.<sup>244</sup> Furthermore, as noted earlier, several countries' arbitration legislation also acknowledges the applicability of international public policy.<sup>245</sup>

Unlike civil law countries, Australia is yet to embrace the distinction between *ordre public interne* and *ordre public international*. To date the High Court of Australia has merely mentioned this distinction in *Akai Pty Ltd v The People's Insurance Co Ltd*:

“In the language of conflict-of-law specialists, the policy of the *Insurance Contracts Act 1984* (Cth) has been made part of Australian *ordre public interne* and *ordre public international*.”<sup>246</sup>

Implicit in this judicial statement is the recognition that a policy embodied or expressed in a statute may be both domestic and international public policy. Yet only the latter is applicable under the public policy exception.

This leads to another challenge – a clear distinction in theory may not guarantee a clear distinction in practice. Since domestic and international public policies pertain to the same law area and may derive from the same sources, how can judges determine whether a particular public policy is intended to operate territorially or extra-territorially? Clear legislative expression or necessary implication is required to rebut the common law presumption against extraterritoriality.<sup>247</sup> Yet some legislation may not even express the relevant public policy, let alone define the scope of that public policy!

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<sup>244</sup> See ILA Interim Report 220 and 226.

<sup>245</sup> See section 3.2.1 of this Chapter – ‘Why international public policy?’.

<sup>246</sup> *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, 433 (Toohey, Gaudron and Gummow JJ) citing Unger J, ‘Use & Abuse of Statutes in the Conflict of Laws’ (1967) 83 LQR 427, 431.

In *Attorney-General (United Kingdom) v Heinemann Publishers Australian Pty Ltd* (1988) 165 CLR 30 (the *Spycatcher case*), Brennan J also referred to ‘domestic public policy’ (and ‘public policy of the domestic law’) in the context of exclusion of foreign law – ‘a rule that foreign laws offensive to the policy of domestic law will not be enforced, domestic public policy prevailing over the offensive foreign law’.

<sup>247</sup> See the earlier discussions in Chapter 2 section 2.2.2 – ‘Extra-territoriality’.

As judges engage in the process of statutory interpretation, can they assume that the more important the public policy, the more likely that this public policy is intended to have an extra-territorial scope? How do they assess the relative importance of a particular public policy?

There is yet another challenge. The table in section 3.3 of this Chapter refers to the ‘comparative element’ of international public policy as one of its distinguishing features. Unlike a domestic transaction where only one law area’s public policy is applicable due to the absence of any foreign element, a transaction involving foreign elements may invoke the public policies of more than one law area. This is a different type of conflict – namely, conflicting public policies between multiple law areas, as opposed to conflicting public policies within a single law area. Resolving such a conflict involves ‘a balancing of multiple interests’<sup>248</sup> between multiple nations, a task which some Australian judges may be reluctant to perform, at least in the context of litigation involving foreign elements. For instance, when determining whether or not to exclude the application of a foreign law on the basis of violation of Australian public policy in *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (the *Spycatcher case*), the Australian High Court said that ‘[i]t is not for the court to balance the interests of foreign governments with the interests of our own’.<sup>249</sup> According to the High Court:

“A situation in which an Australian court could be called upon to determine whether the prima facie rights of a foreign state should be overridden by a superior Australian public interest...would inevitably involve a real danger of embarrassment to Australia in its relationship with that State.”<sup>250</sup>

Thus the main challenges are the embryonic development of the domestic-international distinction in Australia, and the potential conflict of public policies.<sup>251</sup> Together these practical difficulties explain why there remains ‘an uneasy tension’ between domestic

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<sup>248</sup> According to Kenneth Curtin, ‘Judicial Review of Arbitral Awards’ (2001) 55 *Dispute Resolution Journal* 56, 59: “international public policy is a balancing of the interests between the various nations involved and the needs of international commerce for an equitable solution of international disputes.”

<sup>249</sup> *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 53 (Brennan J).

<sup>250</sup> *Ibid*, 45 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ).

<sup>251</sup> This includes conflict between the domestic and international public policies of the same law area on the one hand, and conflict between the international public policies of multiple law areas on the other hand.

and international public policies,<sup>252</sup> and why some national courts remain averse to such a distinction.<sup>253</sup>

The emerging fusion of private international law and public international law is another reason why the distinction between international public policy and transnational public policy is confusing and disappearing.

### 3.4 INTERNATIONAL vs TRANSNATIONAL PUBLIC POLICIES

The comparative table below raises interesting questions. These concern the word ‘international’ as a misnomer (which has both ‘national’ and ‘transnational’ connotations), the increasing resemblance between international public policy and transnational public policy, the applicability of transnational public policy, and priority between these two categories of public policy in the event of conflict. The following sections will address these controversies in turn.

	International	Transnational
<b>Differences</b>	Part of a law area’s national legal system (selfish character)	Not necessarily part of any national legal system (non-selfish character)
	Applicability depends on the private international law of the relevant law area – subject to choice of law process (forum law vs foreign law)	Applicability depends on the <i>lex mercatoria</i> or public international law – not subject to choice of law process (no forum/foreign law distinction)
<b>Similarities</b>	Extra-territorial scope and cross-border nature – both transcend nationalities and national frontiers	

<sup>252</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) para 16-147; Christopher Kuner, 'The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention' (1990) 7 *Journal of International Arbitration* 71, 89-90.

<sup>253</sup> For example, in *Oberster Gerichtshof*, 11 May 1983, extract in *Yearbook Commercial Arbitration* X (1985) 421, the Austrian Supreme Court held that the New York Convention did not differentiate between domestic and international public policies. In *COSID v Steel Authority of India Ltd*, 12 July 1985, extract in *Yearbook Commercial Arbitration* XI (1996) 502, the Delhi High Court of India doubted that there was such a distinction.

See further discussions in Albert Jan van den Berg, 'Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few' (1999) *ICC International Court of Arbitration Bulletin*, 'Arbitration in the Next Decade' Special Supplement 75, 86; Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 428-429.

### 3.4.1 International public policy is national and may also be transnational

International public policy is ‘national’ in the sense of its ‘selfish character’.<sup>254</sup> It pertains to a particular nation, it represents a consensus within that nation, and it is enforceable by the courts of that nation.

However, international public policy is ‘international’ in the sense that it operates in the field of private international law as it applies to transactions involving foreign elements. Furthermore, like transnational public policy, it may be inspired by international aims and therefore represent a consensus within the international community.<sup>255</sup> Consequently, while international public policy usually protects a particular nation’s own interests, it can nevertheless extend to the protection of interests that are common to the international community at large.<sup>256</sup>

This leads to another similarity between international and transnational public policies – both are ‘transnational’ in the sense of their cross-border nature. In other words, both can apply ‘inter-nations’ or ‘beyond nations’ by transcending national frontiers and nationalities. However, these two categories of public policy do not have identical functions or fields of operation.

According to the table in section 3.4 of this Chapter, international public policy operates in the field of private international law and is therefore subject to the choice of law process. One of its functions is to apply the forum law in preference to an otherwise applicable foreign law.<sup>257</sup> Its application is conditional upon its law area being the relevant forum, or its law area’s law being the applicable or governing law.

By contrast, transnational public policy is not concerned with the forum-foreign law distinction – it is applicable irrespective of any choice of law process.<sup>258</sup> Its applicability

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<sup>254</sup> Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 *American Business Law Journal* 511, 514 and 530; 'Transnational (or Truly International) Public Policy and International Arbitration' in *ICCA Congress Series No. 3* (1986) 258 (footnote number 7).

<sup>255</sup> 'Transnational (or Truly International) Public Policy and International Arbitration' in *ICCA Congress Series No. 3* (1986) 258 para 68.

<sup>256</sup> AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 99-100.

<sup>257</sup> For further discussions on choice of law, see Chapter 4 section 4.2.3 – 'Defining mandatory rules'.

<sup>258</sup> AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 99-100; Kenneth Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' (1997) 64 *Defense Counsel Journal* 271.

does not depend on the private international law of any law area because it primarily operates in the field of public international law.

Perhaps this is why transnational public policy has been called ‘public policy as part of public international law’ (or more succinctly, ‘public international public policy’), whereas the corresponding synonyms for international public policy are ‘public policy as part of private international law’ and ‘private international public policy’.<sup>259</sup> Yet these descriptions are neither conclusive nor accurate, particularly in light of the fading distinction between private international law and public international law.

### **3.4.2 Fusion of international & transnational public policies caused by fusion of private & public international law?**

Like international public policy, transnational public policy can also apply to international transactions involving private parties. Unlike most rules of public international law, transnational public policy is not confined to transactions involving sovereign nations and international organisations.

Despite the differences between private international law and public international law with respect to their sources, contents and fields of operation, these two systems of law are gradually converging. Two examples are the internationalisation of private international law, and the development of customary international law.

Private international law is part of a nation’s national law and therefore differs from nation to nation. The inconsistencies and complexities arising from such differences have prompted various international organisations to unify or harmonise these laws. The usual end results are international conventions, treaties and model laws that can be adopted and implemented by the various nations. Such transformation from private international law (which is part of national law) to public international law is known as the process of ‘internationalisation’.<sup>260</sup> Prevalent examples include conventions

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<sup>259</sup> ILA Final Report 251-252.

<sup>260</sup> In the *Serbian and Brazilian Loan Cases* (France v Yugoslavia) [1929] PCIJ Ser. A, No. 20 (1929), 41, the Permanent Court of International Justice (the forerunner of the International Court of Justice) said: “the rules of [private international law] may be common to several states and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between states.”

According to J. G. Collier, *Conflict of Laws* (3<sup>rd</sup> ed, 2001) 390: “there is an international consensus on certain rules of private international law, in the sense that domestic systems adopt and apply them, so that they may be said to be general principles of law and thus of public international law.”

concerning jurisdiction and enforcement of foreign judgments,<sup>261</sup> choice of law rules applicable to international contracts,<sup>262</sup> and mandatory rules governing the carriage of goods by sea.<sup>263</sup> The New York Convention and the Model Law are also the products of this internationalisation process in the context of international commercial arbitration. Consequently, although public international law is primarily concerned with dealings between sovereign nations, it is becoming increasingly applicable to commercial transactions involving private parties.<sup>264</sup>

Another implication of internationalisation is that the same policies embodied in those international instruments may apply as international public policy and/or transnational public policy.<sup>265</sup> Countries which have adopted those international instruments may apply the public policies embodied in those international instruments as their international public policy or, more accurately, 'transnational public policy turned into international public policy'. The ultimate source of those public policies is public international law (ie the relevant international instruments), even though those public policies operate by virtue of the private international law of the Contracting States to those international instruments.

By contrast, countries which have not adopted those international instruments would regard those public policies as transnational public policy, and, unfortunately, may refuse to apply those rules on the basis that only their international public policies are applicable.

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<sup>261</sup> See, eg, *European Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (No 44/2001, entered into force 1 March 2002); *Hague Convention on Exclusive Choice of Court Agreements* (concluded 30 June 2005).

<sup>262</sup> See, eg, *Rome Convention on the Law Applicable to Contractual Obligations* (1980) 19 ILM 1492; *Convention on the Law Applicable to Contracts for the International Sale of Goods* (1955) 510 UNTS 147 (entered into force in 1964), as revised by *Convention on the Law Applicable to Contracts for the International Sale of Goods* (1986) 24 ILM 1573 (not yet in force).

<sup>263</sup> See, eg, *Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading 1924*, as amended by *Brussels Protocol Amending the Hague Rules Relating to Bills of Lading 1968* and *Special Drawing Rights Protocol 1979*. These are commonly known as the 'Hague-Visby Rules', which have been adopted in Australia through the *Carriage of Goods by Sea Act 1991* (Cth).

<sup>264</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) paras 18.71-18.73, notes the application of public international law by several ICC and *ad hoc* commercial arbitrators. The WTO has also developed public international law which is relevant to commercial transactions.

<sup>265</sup> 'Transnational (or Truly International) Public Policy and International Arbitration' in *ICCA Congress Series No. 3* (1986) 258 para 90.

Accordingly, one of the main defects in the current definition of international public policy is the exclusion of certain transnational public policies which may otherwise be applicable.<sup>266</sup>

Meanwhile, it should be noted that not only can public international law be a source of private international law, the opposite also applies. Public international law can derive from national law, which includes private international law. Customary international law is developed from the laws and practices of a sufficient number of countries over a sufficient period of time.<sup>267</sup> These customs and state practices are not merely the sources of public international law, they also represent and even implement the public policies of those countries. Eventually these countries may formalise and strengthen their common public policies by entering into international treaties.

Thus the private-public international law is not a dichotomy but instead, it represents an interactive cycle or the two sides of the same coin. Treaty law-making is consensual while customary international law is based on the commonality between nations (as manifested in state practice). National consensus and international consensus shape and inspire each other. ‘National’ and ‘international’ can become one, so can ‘private’ and ‘public’.

It follows that international public policy can become transnational public policy and vice versa.

It also follows that the sources of international and transnational public policies can be both a similarity and difference. International public policy is not confined to national sources while transnational public policy is arguably not confined to international sources.

As private and public international law become closer, national and international sources of law will become less distinguishable – to the point that it may no longer be necessary to differentiate between international and transnational public policies.

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<sup>266</sup> For further discussions on this point, see sections 3.6.5(b) (‘Enforcement State’s public policy vs Transnational public policy’) and 3.6.6 (‘Revisiting transnational public policy’) of this Chapter.

<sup>267</sup> *North Sea Continental Shelf Cases* (Germany v Denmark; Germany v The Netherlands) (1969) ICJ Rep 3.

### 3.4.3 When does transnational public policy apply?

Transnational public policy may apply directly when the *lex mercatoria* applies. It may also apply indirectly when it becomes part of the enforcement State's national public policy.

#### (a) *Application through the lex mercatoria*

It has been suggested that the enforcement court 'need only consider transnational public policy when the arbitration is both international in scope and subject to the *lex mercatoria*'.<sup>268</sup> As previously defined, the '*lex mercatoria*' consists of rules and principles governing international trade and commerce which exist independently of any national legal system, or which are common to several legal systems.<sup>269</sup> Arbitration is subject to the *lex mercatoria* when the parties have chosen *lex mercatoria* to govern their disputes, or when the arbitrator is otherwise authorised to apply the *lex mercatoria*.<sup>270</sup>

However, making the application of transnational public policy contingent upon the application of the *lex mercatoria* seems unduly restrictive, especially when the *lex mercatoria* is subject to ongoing debate about its content, sources, and even its existence and legitimacy.<sup>271</sup> Effectively this would subject transnational public policy to the same controversies and deficiencies as those of the *lex mercatoria*.<sup>272</sup>

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<sup>268</sup> Kenneth Curtin, 'Judicial Review of Arbitral Awards' (2001) 55 *Dispute Resolution Journal* 56, 59.

<sup>269</sup> See section 5(c) of the Introduction (Terminology – 'Public policy & *lex mercatoria*').

<sup>270</sup> See Model Law Art 28(3)(4); Art 33 of the UNCITRAL Arbitration Rules 1976, <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html)> at 1 November 2005; Art 17 of the ICC Arbitration Rules 1998, <<http://www.jus.uio.no/lm/icc.arbitration.rules.1998>> 1 November 2005.

See also *Commercial Arbitration Act 1990* (Qld) s 22(2), which refers to 'considerations of general justice and fairness'.

<sup>271</sup> See, eg, Friedrich Juenger, 'The *Lex Mercatoria* and Private International Law' (2000) 60 *Louisiana Law Review* 1133; Michael Pryles, 'Application of the *Lex Mercatoria* in International Commercial Arbitration' (2004) 78 *Australian Law Journal* 396; Ning Jin, 'The Status of *Lex Mercatoria* in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 163; Peter Flanagan, 'Demythologising the Law Merchant: The Impropriety of the *Lex Mercatoria* as a Choice of Law' (2004) 15 *International Company & Commercial Law Review* 297; Abul Maniruzzaman, 'The *Lex Mercatoria* and International Contracts: A Challenge for International Commercial Arbitration?' (1999) 14 *American University International Law Review* 657.

<sup>272</sup> Kenneth Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' (1997) 64 *Defense Counsel Journal* 271.



Thus it would be preferable to view the *lex mercatoria* as an additional source of transnational public policy, rather than as the sole criterion or trigger for applying transnational public policy. Otherwise the development and even the recognition of transnational public policy would continue to be hampered.

This thesis does not purport to explore the various controversies surrounding the *lex mercatoria*. It is sufficient to note the growing judicial recognition of the *lex mercatoria* in addition to the ILA's endorsement.<sup>273</sup> For instance, in *DST v Rakoil*, the English court held that the arbitrator's application of common principles underlying the laws of various nations did not affect the enforceability of the award in England.<sup>274</sup> Chapter 1 also mentioned that certain features of the Australian legal system, specifically the internationalisation of Australian law, may facilitate the acceptance of the *lex mercatoria* by Australian courts.<sup>275</sup> In *Dow Jones & Company Inc v Gutnick*, a case concerning choice of law for the tort of online defamation, the Australian High Court noted:

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<sup>273</sup> According to the *ILA Resolution on Transnational Rules* (adopted on 26 April 1992 during the ILA's 65<sup>th</sup> Conference in Cairo), the fact that an arbitrator has based an award on transnational rules rather than on a national law 'should not in itself affect the validity or enforceability' of that award, provided that either the parties have 'agreed that the arbitrator may apply transnational rules', or have 'remained silent concerning the applicable law'. See the commentaries in Emmanuel Gaillard (ed), *Transnational Rules in International Commercial Arbitration* (1993) and Peter Flanagan, 'Demythologising the Law Merchant: The Impropriety of the Lex Mercatoria as a Choice of Law' (2004) 15 *International Company & Commercial Law Review* 297.

<sup>274</sup> According to Donaldson MR in *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Co and Shell International Co Ltd* [1987] 2 Lloyd's Rep 246, 252-253: "it may be, though perhaps it would be unusual, that the parties could validly agree that a part, or the whole, of their legal relations should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law; eg, in a contract to which a Sovereign State was a party. It may well be that the arbitral tribunal could properly give effect to it, just as it would give effect to such an agreement, and the court in its supervisory jurisdiction would also give effect to it, just as it would give effect to a contractual provision in the body of the contract that the proper law of the contract should be some system of foreign law... I see no reason why an arbitral tribunal in England should not, in a proper case, where the parties have so agreed, apply foreign law or international law." This decision was reversed on other grounds: see [1990] 1 AC 295.

Contrast Lord Diplock's view against the *lex mercatoria* in the earlier case of *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 50, 65, where he said that contracts are incapable of existing in a legal vacuum and are mere pieces of paper devoid of all legal effect unless made by reference to some system of private law.

<sup>275</sup> See Chapter 1 section 1.2.2 – 'Relevant features of the Australian legal system'.

“there are precedents for development of such new legal rules, the Law Merchant (*lex mercatoria*) arose in medieval times out of the general custom of the merchants of many nations in Europe. It emerged to respond to the growth of transnational trade. The rules of the common law of England adapted to the Law Merchant. They did so out of necessity and commonsense.”<sup>276</sup>

Furthermore, despite the enduring debate on the content of the *lex mercatoria*, there is an emerging list of principles, including the following:<sup>277</sup>

- Parties are free to enter into contracts and to determine the terms of their contracts (ie the principle of party autonomy).
- However, parties must act, negotiate and perform their contracts in good faith.
- Contracts should be enforced according to their terms (ie the principle of *pacta sunt servanda*).
- However, unfair or unconscionable contracts should be unenforceable.
- Contracts obtained by bribes designed to achieve an illegal object are void or at least unenforceable.
- Invalidity of the main contract does not automatically extend to the arbitration agreement in that contract (ie the principle of separability).
- Parties may lose their rights by waiver or forfeiture if they fail to enforce their rights promptly.

The above principles demonstrate a strong resemblance between the *lex mercatoria* and public policy. Accordingly, Chapter 5 explores the interplay between the principle of party autonomy, the public policy exception and the pro-enforcement policy, while Chapter 6 examines the judicial approach to issues of separability, good faith, waiver, and non-enforcement of illegal contracts.

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<sup>276</sup> *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 422, para 113 (Gleeson CJ et al).

<sup>277</sup> See Lord Mustill’s list of 20 principles and Professor Berger’s list of 78 principles in Michael Pryles, ‘Application of the Lex Mercatoria in International Commercial Arbitration’ (2004) 78 *Australian Law Journal* 396, 398-404. See also the list in the CENTRAL-Transnational Law Database, Centre for Transnational Law, University of Cologne, Germany, <<http://tldb.uni-koeln.de>> at 2 November 2005.

International instruments which collate or codify the *lex mercatoria* include: *Vienna Convention on Contracts for the International Sale of Goods*, 1489 UNTS 3 (entered into force 10 April 1980); *Incoterms 2000*, International Chamber of Commerce, <<http://www.iccwbo.org/incoterms/id3045/index.html>> at 2 November 2005; *UNIDROIT Principles of International Commercial Contracts* (2004) <<http://www.unidroit.org/english/principlescontracts/main.htm>> at 2 November 2005.

For present purposes, it is sufficient to emphasise that the *lex mercatoria* reinforces the imprecise distinction between transnational public policy and international public policy. Transnational public policy signifies the relationship between the *lex mercatoria* and public international law.<sup>278</sup> Transnational public policy is also ‘a hybrid between international public policy and the *lex mercatoria*’.<sup>279</sup> It follows that transnational public policy may apply as the enforcement State’s international public policy.

**(b) Application through national legal system**

When transnational public policy becomes part of the enforcement State’s legal system, it also becomes applicable as that State’s public policy, irrespective of whether or not the *lex mercatoria* applies. Like the transformation of international sources of law into national sources of law, transnational public policy may also become part of a national legal system through the ratification and implementation of an international treaty by the enforcement State.

Alternatively (albeit less likely), transnational public policy may apply as a rule of customary international law. This caters for situations where the enforcement State is not privy to the international treaty embodying the transnational public policy, and also where the transnational public policy is not sourced in any international treaty.

Thus it would seem that, just as international public policy can become transnational public policy, transnational public policy can also become international public policy.<sup>280</sup> Both situations illustrate the possibility that the gradual conflation of public international law and private international law may result in the gradual conflation of international public policy and transnational public policy.

Perhaps ‘transnational public policy’ is another misnomer after all.

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<sup>278</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 808 para 1447.

<sup>279</sup> Kenneth Curtin, ‘Redefining Public Policy in International Arbitration of Mandatory National Laws’ (1997) 64 *Defense Counsel Journal* 271.

<sup>280</sup> See Mark Buchanan, ‘Public Policy and International Commercial Arbitration’ (1988) 26 *American Business Law Journal* 511, 529-530: “The international public policy of the various States determines whether there is a consensus on a particular standard, so in a sense transnational public policy would seem to be a subset of international public policy. It might also be true that the international public policy of any given State would be influenced by an emerging consensus not yet a part of the State’s public policy.”

### 3.4.4 Is transnational public policy supranational?

If words such as ‘national’, ‘international’ and ‘transnational’ cannot differentiate between international and transnational public policies, then what differences, if any, remain for these two categories of public policy?

The dictionary meaning of ‘transnational’ is ‘beyond nations’ whereas the dictionary meaning of ‘international’ is ‘among or between nations’.<sup>281</sup> Transnational public policy has been regarded as truly, really, or genuinely international in the sense of being ‘supranational’.<sup>282</sup> This expresses the ideal that transnational public policy should enjoy universal application and priority over other categories of public policy.<sup>283</sup>

However, does transnational public policy always override other competing public policies? If so, then does this mean that judges need to consider transnational public policy whenever a non-transnational public policy is raised, for instance, to ensure that such non-transnational public policy is not contrary to any transnational public policy?

The current approach seems to be that a transnational public policy applies and prevails, only if it is also part of the enforcement State’s international public policy. The ILA Resolution appears supportive of this approach, as can be seen from its provisions concerning ‘fundamental principles’ and ‘international obligations’, which are two of the ILA’s three categories of international public policy.<sup>284</sup>

Yet confusion still lingers even if transnational public policy is also part of the enforcement State’s international public policy:

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<sup>281</sup> Fernando Mantilla-Serrano, ‘Towards a Transnational Procedural Public Policy’ (2004) *Arbitration International* 333 (citing Webster’s Ninth New Collegiate Dictionary at 1254 and 629).

<sup>282</sup> Gary Born, *International Commercial Arbitration* (2<sup>nd</sup> ed, 2001) 826.

<sup>283</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) para 18.76; Vesselina Shaleva, ‘The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia’ (2003) 19 *Arbitration International* 67, 75; ‘Transnational (or Truly International) Public Policy and International Arbitration’ in *ICCA Congress Series No. 3* (1986) 258 para 35.

<sup>284</sup> ILA Resolution Rec 2(b) refers to fundamental principles ‘forming part of its legal system’ – ie the legal system of the enforcement State.

ILA Resolution Rec 4 also appears to require transnational public policy to be part of the enforcement State’s international public policy.

“it is unclear whether these values are protected because they are incorporated in treaties which bind the forum, or because the principles themselves already belong to a true international public policy.”<sup>285</sup>

However, this is less problematic since the enforcement court can simply apply the relevant public policy, whether as international public policy or as transnational public policy. The real problem arises where transnational public policy is not part of the enforcement State’s international public policy and is therefore inapplicable.

Before exploring this dilemma,<sup>286</sup> it is convenient to examine ‘multinational public policy’, which appears somewhere in between international public policy and transnational public policy.

### 3.5 MULTINATIONAL PUBLIC POLICY

The multinational public policy of a community of nations may prevail over the national public policies of those nations within that community. In *Eco Swiss China Time Ltd v Benetton International NV* (the *Eco Swiss case*),<sup>287</sup> the European Court of Justice (**ECJ**) rendered its first decision since the establishment of the European Union (**EU**) on ‘European public policy’ as a ground for annulling arbitral awards.

#### 3.5.1 *Eco Swiss case*

In the *Eco Swiss case*, the Dutch Supreme Court referred to the ECJ for a preliminary ruling on questions concerning the applicability of Art 81 of the Treaty Establishing the European Community (the **EC Treaty**), which is a provision against anti-competition.<sup>288</sup> Specifically, would non-compliance with Art 81 constitute a ground for setting aside the award on the basis of public policy, when Dutch national law does not regard breach of

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<sup>285</sup> Hans van Houtte, ‘From a National to a European Public Policy’ in James Nafziger and Symeon Symeonides (eds), *Law & Justice in a Multistate World – Essays in Honour of Arthur T Von Mehren* (2002) 841, 846.

<sup>286</sup> See section 3.6.5 of this Chapter – ‘Conflict (& choice) of public policies’.

<sup>287</sup> *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816.

<sup>288</sup> *Treaty Establishing the European Community* 1957 (Rome, 25 March 1957).

Article 81(1) of the EC Treaty (formerly Art 85(1)) prohibits ‘all agreements...which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market’. According to Art 81(2), ‘agreements or decisions prohibited pursuant to this Article shall be automatically void’.

national competition law as falling with the public policy ground for annulment?<sup>289</sup> The ECJ confirmed that the national courts of the EU member States should allow a claim for annulment on the ground of non-compliance with Art 81 of the EC Treaty.<sup>290</sup> Several implications of this decision are noteworthy.

Firstly, the national courts of the EU member States must apply the EU public policy (enshrined in the EC Treaty) as part of, or in addition to, their national laws and public policies. These national courts must apply and enforce the EU public policy irrespective of whether their national public policies are silent, or inconsistent with the EU public policy.<sup>291</sup>

Secondly, the ECJ only addressed whether non-compliance with the EC Treaty (and therefore violation of the EU public policy) would constitute a ground for setting aside an award. It is uncertain whether such non-compliance and violation would also fall within the public policy exception to the enforcement of an award.<sup>292</sup> However, the ECJ commented that Art 81 of the EC Treaty ‘may be regarded as a matter of public policy within the meaning of the New York Convention’ because of its mandatory and fundamental nature:

“Art 81 constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Art 81(2)..., that agreements or decisions prohibited pursuant to that article are to be automatically void.”<sup>293</sup>

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<sup>289</sup> *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, 832.

<sup>290</sup> *Ibid*, 837 and 841: “the national court should allow a claim for annulment of an arbitration award on the ground that it is contrary to Art [81] of the Treaty even if the national rules of procedure allow annulment on the ground of illegality only in the event of a conflict with public policy or accepted rules of morality.”

<sup>291</sup> Interestingly, the ECJ was of the view that the Dutch procedural rules ‘render the application of the Community law excessively difficult’ and do not allow adequate judicial supervision of arbitral awards: see *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, 835.

<sup>292</sup> Chapter 7 section 7.2 explores whether the same approach should apply to the public policy exception in both enforcement and annulment proceedings.

<sup>293</sup> *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, 849.

At 836-837, the ECJ regards Art 81 as ‘matters of public Community policy’: “This view that the rules on competition are part of the ‘public economic policy of the Community’ finds wide support in the legal literature and in the case law of many Member States.”

The above passage indicates that the ECJ also uses fundamentality as a criterion for determining whether something can be characterised as public policy. It also suggests that mandatory rules can fall within the public policy exception.<sup>294</sup>

This leads to another implication. The *Eco Swiss case* seems to regard the application of the EU public policy as an exception to the rule that only the enforcement State's public policies are relevant under the New York Convention's public policy exception.<sup>295</sup> Consequently, some scholars have regarded the EU as a 'supranational organisation' whose law and public policy would prevail over those of its member States.<sup>296</sup>

At first glance, multinational public policy would be 'supranational' in the sense of its supremacy over national public policy. However, multinational public policy is not supranational in the sense that it applies as part of, rather than independent of, a national legal system. It is arguable that EU public policy is, in fact, part of the enforcement State's public policy. The ECJ in the *Eco Swiss case* has elevated Art 81 of EC Treaty 'to the level of public policy',<sup>297</sup> while other European courts regard any provision of EC Treaty directly applicable in the member States as automatically part of national public policy.<sup>298</sup>

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<sup>294</sup> Christoph Liebscher, 'European Public Policy after Eco Swiss' (1999) 10 *American Review of International Arbitration* 81, 84. See further discussions in Chapter 4 section 4.2 – 'Public policy vs Mandatory rules'.

<sup>295</sup> ILA Interim Report 243.

<sup>296</sup> See, eg, Hans van Houtte, 'From a National to a European Public Policy' in James Nafziger and Symeon Symeonides (eds), *Law & Justice in a Multistate World – Essays in Honour of Arthur T Von Mehren* (2002) 841, 848

<sup>297</sup> ILA Interim Report 232 and 243.

<sup>298</sup> ILA Interim Report 243 cites two Austrian Supreme Court decisions, 3 Ob. 115/95 dated 23 February 1998 (reported in (1999) Rev. Arb. 383) and 3 Ob. 2372/96 dated 5 May 1998.

### 3.5.2 Multinational public policy is national, international & even transnational?

It can already be seen that multinational public policy manifests some features of the other categories of public policy. For instance, it is 'national' because it is part of the national public policy of the member States. It is 'international' and 'transnational' because of its extra-territorial or cross-border operation. Like transnational public policy, the applicability and interpretation of multinational public policy are also governed by the rules of public international law. But unlike transnational public policy, multinational public policy may not bind non-member States.<sup>299</sup>

Nonetheless, multinational public policy can develop into transnational public policy as the relevant multinational community expands:

“What is a fundamental policy in international law and in international relations will invariably also be part of the public policy of most national and multinational communities. Equally, what is a fundamental law or policy of a multinational community will also be part of the national public policies of the member States of that community.”<sup>300</sup>

For instance, the Commission on European Contract Law has been working to establish the 'Principles of European Contract Law', which are intended to become part of the 'European Civil Code'.<sup>301</sup> Since these general principles of contract law are not based on any single legal system, but are reflective of the existing international conventions,<sup>302</sup> they have the potential of becoming the multinational public policy of the EU and even transnational public policy.

A public policy that is sufficiently fundamental is often adopted as national public policy (which includes international public policy), multinational public policy, or even transnational public policy. Defining the scope of the public policy exception by reference to the domestic-international-multinational-transnational categorisation risks turning the public policy exception into an unruly horse.

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<sup>299</sup> ILA Final Report 261; Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) para 406; Yves Brulard and Yves Quintin, Yves, 'European Community Law and Arbitration: National versus Community Public Policy' (2001) 18 *Journal of International Arbitration* 533, 546.

<sup>300</sup> Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) para 404.

<sup>301</sup> See Commission on European Contract Law, *Introduction to the Principles of European Contract Law*, <[http://frontpage.cbs.dk/law/commission\\_on\\_contract\\_law/survey\\_pecl.htm](http://frontpage.cbs.dk/law/commission_on_contract_law/survey_pecl.htm)> at 11 November 2005.

<sup>302</sup> Ibid.



### 3.6 WHY NOT INTERNATIONAL PUBLIC POLICY? DEPARTING FROM THE CURRENT CATEGORISATION OF PUBLIC POLICY

Unlike the ILA, the UNCITRAL Working Group on Arbitration remains hesitant about adopting international public policy, in spite of their support for a narrow approach to the public policy exception. UNCITRAL is currently drafting a new Model Law provision on the enforcement of interim measures of protection (known as ‘Draft Art 17 bis’). During the debate on the drafting of the public policy exception in Art 17 bis, the prevailing view remained that international public policy was ‘still a vague term’ and ‘susceptible to different interpretations’.<sup>303</sup> UNCITRAL expressed concerns that deviating from the public policy exceptions in New York Convention Art V and Model Law Art 36, such as using the expression ‘international public policy’, may introduce unwarranted complexities and ‘have the potential of broadening the concept of public policy’.<sup>304</sup>

UNCITRAL is yet to fully explore ‘the various differences between domestic public policy, transnational public policy and international public policy’, although it has observed that ‘debate on the distinctions and content of each of these terms was not settled’.<sup>305</sup> This leaves open the possibilities of redefining ‘international public policy’, and even of omitting the current categories of public policy altogether. Nevertheless, the latest version of the draft Art 17 bis merely cross-references to the public policy exception in Model Law Art 36(1)(b)(ii).<sup>306</sup>

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<sup>303</sup> *Report of the Working Group on Arbitration on the Work of its 38<sup>th</sup> Session*, UN GA, 36<sup>th</sup> session, UN Doc A/CN.9/524 (2 June 2003) paras 51 and 52.

<sup>304</sup> *Ibid*, para 51.

<sup>305</sup> *Ibid*.

<sup>306</sup> According to *Settlement of Commercial Disputes – Interim Measures of Protection – Note by the Secretariat*, UN GA, 43<sup>rd</sup> session, UN Doc A/CN.9/WG.II/WP.138 (8 August 2005) para 51, draft Art 17 bis (2)(b)(ii) currently reads: “The court may refuse to recognize or enforce an interim measure of protection, only... if the court finds that... any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.” The UNCITRAL Working Group on Arbitration is likely to adopt this version at its 43<sup>rd</sup> session in October 2005, before presenting the final version for review and adoption at the UNCITRAL’s 39<sup>th</sup> session in 2006: see *Annotated Provisional Agenda*, UN GA, 43<sup>rd</sup> session, UN Doc A/CN.9/WG.II/WP.135 (19 July 2005) para 25.

### 3.6.1 Avoiding misnomers

The emerging fusion of private international law and public international law is obscuring the distinction between the current categories of public policy.

Firstly, both private international law and public international law are ‘transnational’ in the sense that they transcend national frontiers. They apply ‘inter-nations’ and ‘beyond nations’. The same can also be said of international public policy and transnational public policy.

Secondly, public international law may derive from, or become part of, national law. Similarly, transnational public policy may become part of national law – it may become a nation’s international public policy.

Thirdly, public international law is not always ‘supranational’ in the sense of its supremacy over national law. For instance, a nation which is not a party to an international treaty is not bound by the rules of that treaty, subject to various exceptions such as *jus cogens* and customary international law.<sup>307</sup>

Thus the words ‘national’, ‘international’ and ‘transnational’ cannot articulately differentiate between national, international and transnational public policies.<sup>308</sup>

Furthermore, the possible progression of these categories of public policy may make it unnecessary to differentiate between them. For instance, a series of judicial decisions in Australia continuously acknowledge and adhere to a particular public interest over a period of time, leading to the emergence of **domestic public policy**. The Federal Parliament of Australia then enacts a statute to implement this public policy and expressly extends the application of such policy to transactions involving foreign elements (ie **international public policy**). Subsequently Australia joins with several other countries to establish a multinational community to uphold their shared interests and beliefs. This particular policy is expressed as one of the purposes for establishing this community (ie **multinational public policy**). As more and more countries begin to recognise and implement this policy, they enter into an international treaty to strengthen

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<sup>307</sup> These exceptions are beyond the scope of this thesis.

<sup>308</sup> ‘Transnational (or Truly International) Public Policy and International Arbitration’ in *ICCA Congress Series No. 3* (1986) 258 para 52.

compliance with this public policy. This treaty is then ratified and implemented by a substantial number of countries world-wide (ie **transnational public policy**).<sup>309</sup>

### 3.6.2 Disparity in the judicial approach to international public policy

In light of the continuing confusion between the various categories of public policy, judicial disparity in the application of international public policy is likely to persist. The following cases have been cited as endorsing international public policy in accordance with the narrow approach to the public policy exception. Yet some judges in these cases were somewhat overwhelmed by the misnomer of international public policy.

The Milan Court of Appeal seemingly had transnational public policy in mind when describing international public policy:

“We must say where the consistency [with public policy] is to be examined, reference must be made to the so-called international public policy, being a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.”<sup>310</sup>

In *Renusagar Power Co Ltd v General Electric Co* (the *Renusagar case*), the Indian Supreme Court confirmed its preference for a narrow approach to the public policy exception and yet rejected the concept of international public policy as lacking ‘workable definition’, even though the Court’s ultimate formulation of ‘public policy’ resembled international public policy:

“In view of the absence of a workable definition of ‘international public policy’, we find it difficult to construe the expression ‘public policy’ in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced.”<sup>311</sup>

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<sup>309</sup> Thus the categories of domestic, international, multinational and transnational public policies may be in the ascending order of prevalence. However, it does not necessarily follow that these categories are also in the ascending order of priority.

See section 3.6.4 of this Chapter for public policies which may fall within all categories of public policy.

<sup>310</sup> *Allsop Automatic Inc v Technoski snc*, Milan Court of Appeal, 4 December 1992, extract in Yearbook Commercial Arbitration XXII (1997) 725.

<sup>311</sup> *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22, para 37) <<http://www.kluwerarbitration.com>> at 26 July 2004.

“the expression ‘public policy’ ...must necessarily be construed in the sense the doctrine of public policy as applied in the field of private international law.”<sup>312</sup>

Interestingly, the High Kong Court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (the *Hebei case*) appears to interpret the *Renusagar case* as abandoning the search for transnational public policy:

“Does [‘international public policy’] mean some standard common to all civilized nations? Or does it mean those elements of a State’s own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter. If it were the former, it would become so difficult of ascertainment that a court may well feel obliged as the Supreme Court of India did in *Renusagar*...to abandon the search for it.”<sup>313</sup>

The High Kong Court of Final Appeal then emphasised that only the contravention of the enforcement State’s public policy would justify non-enforcement of an award under the public policy exception:

“In some decisions..., public policy has been equated to international public policy. As already mentioned, Art V(2)(b) specifically refers to the public policy of the forum. No doubt, in many cases, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum.”<sup>314</sup>

The second reference to ‘international public policy’ in the above passage arguably means ‘transnational public policy’. This passage also implies that transnational public policy must be part of the enforcement State’s public policy in order to fall within the public policy exception. The ILA Resolution shares this view. Yet the ILA’s notion of international public policy already incorporates transnational public policy to some extent. This warrants a closer examination of the ILA Resolution.

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<sup>312</sup> Ibid, para 39.

See also *Smita Conductors Ltd v Euro Alloys Ltd* (2001) 7 SCC 728 (Supreme Court of India, 31 August 2001), extract in Yearbook Commercial Arbitration (India No. 38, para 15), <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>313</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Bokhary PJ).

<sup>314</sup> Ibid (Mason NPJ).

### 3.6.3 Revisiting ILA's approach to international public policy

Some scholars have questioned whether the ILA's categories of international public policy may be excessively rigid; they even predicted that the ILA's categorisation 'may not be universally accepted as it emerges from case law in a limited number of countries'.<sup>315</sup> Indeed, from the Australian perspective, acceptance of the ILA's categories of international public policy is dependent upon acceptance of the categories of domestic, international and transnational public policies. As previously mentioned, Australian courts are yet to firmly embrace the distinction between domestic and international public policies,<sup>316</sup> let alone the added complexities of transnational public policy and the sub-categories of international public policy. Consequently, Australian courts may not endorse the ILA's concept of international public policy as the appropriate test for determining the enforceability of foreign arbitral awards under the public policy exception.

Furthermore, the ILA's categories of 'fundamental principles' and 'international obligations' are not immune from interpretational difficulties. For instance, the ILA's definition of 'international obligations' and its reference to an existing or emerging international consensus in the context of determining whether a principle is sufficiently fundamental do not clearly distinguish between international and transnational public policies.

Recommendation 2(a) of the ILA Resolution states that only the enforcement State's public policies are applicable. It confirms that the relevant public policy must be fundamental from the perspective of the enforcement State only and exclusively:

“A court verifying an arbitral award's conformity with fundamental principles, whether procedural or substantive, should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of contract or the law of the seat of the arbitration.”

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<sup>315</sup> See, eg, Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 723 para 26-117.

<sup>316</sup> See the previous discussions in section 3.3.2 of this Chapter – 'Challenges arising from the domestic-international dichotomy'.

However, this is subject to Recommendation 2(b):

“Nevertheless, in order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify refusal to recognise or enforce an award, a court should take into account, on the one hand, the international nature of the case and its connections with the legal system of the forum, and, *on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus)*. When said consensus exists, the term ‘transnational public policy’ may be used to describe such norms.” (Emphasis added.)

The use of the phrase ‘international nature of the case and its connections with the legal system of the forum’ in Recommendation 2(b) confirms that international public policy operates in the field of private international law. It may also be interpreted as a nexus requirement – if the enforcement State is sufficiently connected with the foreign arbitral award, then its public policy would be sufficiently fundamental to justify the extra-territorial application to that award.

However, the second half of Recommendation 2(b) (beginning with the italicised phrase ‘on the other hand’) appears somewhat inconsistent with other provisions in the ILA Resolution. For instance, if the enforcement court need not consider the perspectives of other nations when verifying an award’s conformity with the enforcement State’s public policy under Recommendation 2(a), then why does the court need to consider the existence of any international consensus when determining whether such public policy is sufficiently fundamental to justify non-enforcement under Recommendation 2(b)?

More importantly, why mention ‘transnational public policy’ if international public policy is the applicable test? It may be that Recommendation 2(b) merely intends to clarify that international public policy can derive from international sources of law such as international treaties and customs, and that international public policy and transnational public policy can overlap. It recognises the comparative nature of international public policy, and therefore seeks to promote judicial consistency and comity by encouraging the courts to look beyond their own legal systems.<sup>317</sup> However, greater clarity and consistency in expression are necessary to ensure that the ILA’s

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<sup>317</sup> As explained in ILA Final Report 259: “An enforcement court should look at the practice of other courts, writings or commentators, and other sources, to determine to what extent a principle that is submitted to be fundamental is regarded as fundamental by the international community. This should facilitate consistency in the application of the public policy test.”

implicit recognition of the overlap between international and transnational public policies does not contradict or dilute the ILA's express endorsement of international public policy.

Why not expressly acknowledge that transnational public policy can apply additionally or alternatively to international public policy? It is understandable that the ILA may feel constrained by the inadequate judicial support for transnational public policy. However, the apparent inconsistencies between Recommendations 2(a) and (b) may risk defeating the purpose of promoting judicial consistency in the application of the public policy exception. For instance, one may interpret these recommendations to mean that a public policy must be fundamental to both the enforcement State and the international community before it can justify non-enforcement of a foreign arbitral award. Does this mean that this public policy must be both international and transnational at the same time? Despite the potential overlap between these two categories of public policy, a public policy fundamental to the enforcement State is not necessarily fundamental to the international community, and vice versa.<sup>318</sup>

Another interpretation of Recommendations 2(a) and (b) is that, a public policy which is sufficiently fundamental to the enforcement State would suffice, unless it is contrary to another public policy which is fundamental to the international community. However, if the ILA Resolution wishes transnational public policy to prevail over international public policy in the event of inconsistency, then it should expressly say so. The ILA's insistence that transnational public policy must be part of the enforcement State's public policy arguably avoids, or at least reduces, the potential conflict between transnational public policy and international public policy. This is because a nation is unlikely to adopt a transnational public policy that is inconsistent with its national public policy. But what if there is a conflict between international public policy and transnational public policy?<sup>319</sup>

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<sup>318</sup> According to 'Transnational (or Truly International) Public Policy and International Arbitration' in *ICCA Congress Series No. 3* (1986) 258 footnote number 7, international public policy and transnational public policy are not identical but similar: "there can be no total identity or assimilation between the two kinds of 'public policies', inasmuch as the State international public policy inevitably retains a particular or even selfish character, at least in part. Similarly, the fundamental values and interests of a given State can hardly coincide fully with the values and fundamental interests of the international community, just as the national concept of 'international public policy' cannot be identified with that of transnational public policy."

<sup>319</sup> Section 3.6.5 of this Chapter further explores such a conflict.

Moreover, if the various categories of public policy overlap to the extent that they are almost indistinguishable, then it would be necessary to reconsider the appropriateness of using the current categories of public policy to delimit the scope of the public policy exception. However, this does not mean that domestic, international and transnational public policies should be obliterated. Rather, it means that it is desirable to re-define the scope of the public policy exception in order to recognise that international public policy may overlap with transnational public policy, as well to recognise that transnational public policy which does not overlap with international public policy may be applicable in appropriate circumstances.

### 3.6.4 Overlapping categories of public policy

Some public policies may fall within all categories of public policy. The first example is the public policy against **corruption** such as bribery. Arbitrators have refused to enforce contracts which contravene this public policy. Otherwise any awards purporting to enforce such contracts may be unenforceable under the public policy exception.<sup>320</sup>

In ICC Case No. 1110, the arbitrator stated that corruption is ‘an international evil’ which is ‘contrary to good morals and to an international public policy common to the community of nations’.<sup>321</sup> The arbitrator presumably had ‘transnational public policy’ in mind when referring to ‘international public policy’.<sup>322</sup>

Other arbitrators have stated that sanctions against corruption and bribery are ‘either Swiss or international public policy’ (Switzerland being the place of arbitration),<sup>323</sup> and even ‘truly international or transnational public policy’.<sup>324</sup>

Indeed, anti-corruption multilateral and regional conventions signify the emergence of transnational public policy or at least multinational public policy.<sup>325</sup>

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<sup>320</sup> See Chapter 6 section 6.4 – ‘Case study 1: Illegality’.

<sup>321</sup> Final Award in ICC Case No. 1110 (1963) para 21.

<sup>322</sup> This is reinforced by the arbitrator’s statement at para 16: “there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. This principle is especially apt for use before international arbitration tribunals that lack a ‘law of the forum’ in the ordinary sense of the term.”

<sup>323</sup> Final Award in ICC Case No. 5622 (1988) para 16.

<sup>324</sup> Final Award in ICC Case No. 6248 (1990) para 27.



The second example is the public policy against ‘**universally-condemned international activities**’ such as terrorism, drug-trafficking, prostitution and paedophilia. The English courts have confirmed that these would violate English public policy.<sup>326</sup> Condemnation of these activities may have become transnational public policies, although not all countries recognise such public policies. Like the principles of customary international law, transnational public policy does not require universal or unanimous acceptance by all countries.<sup>327</sup>

It is ironic that the **pro-enforcement policy** of the New York Convention may be the third example. Some Convention countries such as the United States regard the pro-enforcement policy as part of their national public policy.<sup>328</sup>

In any event, the status of the pro-enforcement policy as multinational public policy would require all Convention countries to uphold it. Applying the *Eco Swiss case* by analogy, the courts of the Convention countries must apply multinational public policy, irrespective of whether their national public policies are silent, or inconsistent with that multinational public policy.

Given the wide adoption of the New York Convention,<sup>329</sup> the pro-enforcement policy has arguably attained the status of transnational public policy. It is uncertain whether this is what the US Court of Appeals intended when it implicitly referred to the pro-enforcement policy as ‘supranational emphasis’ in the *Parsons case*.<sup>330</sup>

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<sup>325</sup> ILA Interim Report 235-236 cites the OECD Convention on Combating the Bribery of Foreign Officials in International Transactions 1997.

See other examples in Webb, Philippa, ‘The United Nations Convention Against Corruption’ (2005) 8 Journal of International Economic Law 191, including the United Nations Convention Against Corruption of 9 December 2003; the Inter-American Convention Against Corruption 1996; the Council of Europe Civil Law Convention on Corruption 1999; the African Union Convention on Preventing and Combating Corruption 2003.

<sup>326</sup> See, eg, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 775, which is discussed in Chapter 6 section 6.4 – ‘Case study 1: Illegality’.

<sup>327</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 851 (para 1521) and 863 (para 1535).

<sup>328</sup> David Branson, ‘USA’ in Global Legal Group, *International Comparative Legal Guide to International Arbitration 2004* (2004) 241, 245.

<sup>329</sup> According to UNCITRAL, there are 136 Convention countries as at 18 August 2005: <[http://www.uncitral.org/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/en/uncitral_texts/arbitration/NYConvention_status.html)>.

<sup>330</sup> See *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 974 (2<sup>nd</sup> Cir, 1974): “a circumscribed public policy doctrine was contemplated by the Convention’s

On the other hand, countries such as Taiwan, which are incapable of acceding to the New York Convention, may also adhere to the pro-enforcement policy by enacting Convention-compliant laws.<sup>331</sup>

Characterising the pro-enforcement policy as transnational public policy nevertheless poses conundrums. For instance, are the courts in non-Convention countries obliged to apply the pro-enforcement policy, or must transnational public policy be part of those countries' national public policy in order to be applicable? The supremacy and universal application of transnational public policy remain disputable.

Another conundrum is inherent in the public policy paradox of the New York Convention.<sup>332</sup> If the pro-enforcement policy were transnational public policy, then it would override the public policy exception (which is currently confined to international public policy), and therefore render that exception meaningless. This leads to the following alternative approaches.

- First, the public policy exception is also a transnational public policy and is therefore on the same level as the pro-enforcement policy. This approach is likely to confuse – how can a provision which is confined to the enforcement State's international public policy be regarded as a transnational public policy?

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framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis."

See also *Belship Navigation Inc v Sealift Inc*, United States District Court (Southern District of New York), 27 July 1995, extract in Yearbook Commercial Arbitration XXI (1996) 799 para 21: "Public policy is best served by promoting the 'supra-national' goal of the Convention, promoting the enforcement of international arbitration agreements."

<sup>331</sup> Taiwan has overcome its inability to accede to the New York Convention by creating a regulatory regime that is compliant with the New York Convention and the Model Law (eg Arbitration Law of Taiwan as promulgated on 24 June 1998), as well as by entering into bilateral treaties. See Chen-Huan Wu, *Recognition and Enforcement of Foreign Arbitral Awards in the Republic of China* (SJD Thesis, Bond University, 2003) 5-6; Catherine Li, "The New Arbitration Law of Taiwan - Up to an International Level?" (1999) 16 *Journal of International Arbitration* 127.

<sup>332</sup> The 'public policy paradox of the New York Convention' means that both the pro-enforcement and the public policy exception are paradoxically public policies themselves: see the Thesis Statement in the Introduction.

- Second, the transnational pro-enforcement policy is subject to the enforcement State's international public policy – ie the international public policy exception to the transnational pro-enforcement policy. This approach is also likely to confuse those who subscribe to the view that transnational public policy trumps international public policy in the event of inconsistency.
- Third, both the pro-enforcement policy and the public policy exception are international public policies (or are otherwise on the same level) – an award's enforceability depends on a balance of these competing public policies. For instance, the enforcement court should refuse enforcement only if the alleged public policy falls within the public policy exception and outweighs the pro-enforcement policy.

The third approach seems to prevail at present. For instance, the ILA Resolution seeks to balance the public policy exception against the public policy favouring arbitral finality (which is part of, or related to, the pro-enforcement policy). It views the enforcement State's international public policy as an exception to the pro-enforcement policy, which represents an appropriate balance between these competing public policies.<sup>333</sup>

Thus the application of the public policy exception entails the balancing of competing public policies. At stage one in the application of the public policy exception, only public policies which outweigh the pro-enforcement policy can fall within the public policy exception. At stage three in the application of the public policy exception, only public policies which outweigh the pro-enforcement policy can justify non-enforcement of arbitral awards.

Any balancing exercise is undoubtedly flexible and unpredictable. The current perception that there is a conflict between the public policy exception and the pro-enforcement policy has engendered the desire to narrow the scope of the public policy exception. Reorienting the current perception of the New York Convention's public policy paradox may facilitate clarity and consistency in the judicial application of the public policy exception. For instance, the public policy exception and the pro-enforcement policy are not conflicting public policies, but rather, they are interactive

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<sup>333</sup> See the preamble to the ILA Resolution, as well as Recs 1(a) and (b).

and interdependent public policies with the same overriding objectives of preventing and sanctioning injustice in arbitration.<sup>334</sup>

By raising questions without fully answering them, it can already be seen that the current categorisation of public policy as domestic, international, multinational and transnational, may lead to an unruly application of the unruly public policy exception. Nevertheless, as previously mentioned, these categories of public policy are likely to persist. Hence the need to further explore the potential conflicts between these categories of public policy.

### 3.6.5 Conflict (& choice) of public policies

#### (a) *Enforcement State's public policy vs Foreign public policy*

Where the enforcement State's domestic public policy conflicts with another State's public policy, the former does not apply because it does not fall within the public policy exception. Consider the hypothetical scenario in which the enforcement State requires 'reasoned awards' (ie requires arbitrators to give reasons in their awards), whereas the supervisory State does not.<sup>335</sup> If the enforcement State's requirement for reasoned awards is merely regarded as domestic public policy, a foreign award which lacks reasons may remain enforceable in the enforcement State, even though such an award may be set aside in the enforcement State if it were a domestic award made in that State.<sup>336</sup>

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<sup>334</sup> Chapter 5 further explores the New York Convention's public policy paradox by examining other provisions associated with the public policy exception. Chapter 6 exposes the problems arising from the current perception of, and the narrow approach to, the public policy exception.

<sup>335</sup> Section 3(b) of the Introduction defines 'supervisory State'.

<sup>336</sup> See eg, the Italian decision of *Efxinos Shipping Co Ltd v Rawi Shipping Lines Ltd*, Genoa Court of Appeal, 2 May 1980, extract in Yearbook Commercial Arbitration (Italy No. 51) <<http://www.kluwerarbitration.com>> at 27 July 2004; the Taiwanese decision of *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, 18 May 1984, Supreme Court, Tai Kang Zi Di 234 Hao Min Shi Cai Ding; the French decision of *Denis Coakely Ltd v Ste Michel Reverdy*, Court of Appeal of Reims, 23 July 1981, extract in Yearbook Commercial Arbitration (France No. 6) <<http://www.kluwerarbitration.com>> at 27 July 2004.

See further discussions in Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) para 9-31; Albert Jan van den Berg (ed), *International Dispute Resolution: Towards an International Arbitration Culture* (1998) 211.

On the other hand, if the enforcement State's requirement for reasoned awards is regarded as international public policy, then the court of that State may refuse to enforce awards which contravene this requirement. Accordingly, where the enforcement State's international public policy conflicts with another State's public policy, the former prevails because the latter does not fall within the public policy exception. However, to the extent that the other State's public policy reflects transnational public policy, the enforcement court may need to give effect to that public policy. This leads to the next type of conflict.

**(b) *Enforcement State's public policy vs Transnational public policy***

Where the enforcement State's international public policy conflicts with a transnational public policy and the latter would render an award unenforceable, which public policy should apply or prevail under the public policy exception?

The court in the enforcement State may not apply transnational public policy to deny enforcement, because it is the guardian of the enforcement State's public policies only, and is therefore entitled to confine the public policy exception to those public policies.

By contrast, arbitrators are not 'guardians of the public policy of any particular State'.<sup>337</sup> Some of them are inclined to defer to transnational public policy in compliance with their 'paramount duty to the international community'.<sup>338</sup> Yet other arbitrators may submit to the public policies of the potential places of enforcement in compliance with their duty to render enforceable awards.<sup>339</sup>

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<sup>337</sup> Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 192; Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 *Arbitration International* 274, 285; Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 319; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 111 para 6-33.

<sup>338</sup> Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 193; Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 *American Business Law Journal* 511, 530.

Such duty is known as '*societas mercatorum*': Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2<sup>nd</sup> ed, 2001) 529.

<sup>339</sup> See, eg, Art 35 of the ICC Rules of Arbitration: "the Court and the Arbitral Tribunal...shall make every effort to make sure that the award is enforceable at law".

See also the discussions in Mohammad Reza Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?' (1992) 10 *International Tax & Business Lawyer* 59, 81-82 and Ning Jin, 'The Status of *Lex Mercatoria* in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 163, 195.

The ultimate question should be what is in the interests of justice, fairness or reasonableness. The choice and application of public policy should not cause or condone injustice, or otherwise undermine the public confidence in arbitration. Take an extreme example where the enforcement State condones bribery and corruption. The arbitrator should uphold the transnational public policy against corruption.<sup>340</sup> Similarly, the enforcement court should not enforce a corrupt award in violation of this transnational public policy.

### 3.6.6 Revisiting transnational public policy

The preceding discussions demonstrate that both arbitrators and judges may encounter conflicts between international public policy and transnational public policy. Arbitrators are perceived as better suited to apply transnational public policies.<sup>341</sup> This is because arbitrators are not confined to the public policies of any law area, and they can be authorised to apply the *lex mercatoria*. However, it does not automatically follow that judges cannot (or should not) apply transnational public policies under the public policy exception.

#### (a) *An alternative perception of transnational public policy*

It is useful to adopt an alternative perception of the nature and role of the *lex mercatoria* and transnational public policy which recognises their legitimacy, utility and applicability. For instance, the *lex mercatoria* is not fully independent or completely detached from the sovereign powers of all nations:

“[To see] *lex mercatoria* not as an autonomous system of law covering all aspects of international commercial relations to the exclusion of national law, but rather as a resource of law composed of customs, practices, international conventions, general principles of law derived from national laws and arbitral awards. *Lex mercatoria* and national law should co-exist, and both should be applied as mutual gap-fillers in order to supply fair and reasonable solutions to particular issues.”<sup>342</sup>

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<sup>340</sup> See Final Award in ICC Case No. 1110 (1963), as previously discussed in section 3.6.4 of this Chapter.

<sup>341</sup> Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 *American Business Law Journal* 511, 514-515; Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 192; Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 855 (para 1525) and 997 (para 1712).

<sup>342</sup> Ning Jin, 'The Status of *Lex Mercatoria* in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 163, 192.

The same perception can also extend to transnational public policy:

“Allowing the use of transnational public policy as the relevant standard of review in arbitration under the *lex mercatoria* will advance the parties’ motivations in specifying the *lex mercatoria* as the applicable law. While transnational public policy further removes the public policy umbrella from purely domestic policy considerations than does international public policy, fundamental fairness still can be maintained because transnational public policy will represent a collection of internationally accepted and fundamental principles of public policy.”<sup>343</sup>

Admittedly, transnational public policy and the *lex mercatoria* are not identical. Not every principle of the *lex mercatoria* is transnational public policy, and vice versa. However, the applicability of transnational public policy should not be subject to the enforcement State’s public policies in circumstances which would cause or condone injustice.

***(b) Applying transnational public policy additionally or alternatively to the enforcement State’s public policy***

Transnational public policy should be applicable under the public policy exception as an alternative or exception to the enforcement State’s (international) public policy.

For instance, it would be inappropriate for the enforcement court to enforce an award if such enforcement would violate a transnational public policy, and the enforcement State does not have a comparable (national) public policy. Recall the example in which the enforcement State does not outlaw bribery. The court of that State should apply the transnational public policy against bribery to refuse to enforce an award tainted by bribery, especially when the enforcement of such an award would cause or condone injustice. This application of transnational public policy as an additional ground for non-enforcement of awards is analogous to, or an extension of, the approach in the *Eco Swiss case* (ie application of multinational public policy as an additional ground for annulment of awards).

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<sup>343</sup> Kenneth Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' (1997) 64 *Defense Counsel Journal* 271, 283. See also AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 99; and Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 259, 315.

Another example is the application of the enforcement State's (international) public policy subject to transnational public policy. The enforcement court should not use the enforcement State's (international) public policy to refuse enforcement if that public policy is inconsistent with a transnational public policy. For instance, if the enforcement State's (international) public policy is anti-competition and therefore departs from the transnational public policy in favour of competition, then it would be inappropriate for the enforcement court to render an award unenforceable under that public policy. In other words, the public policy exception should, ideally, exclude the enforcement State's public policies which are inconsistent with transnational public policies. This is because such public policies are primarily protective of the enforcement State's parochial or peculiar interests, and may not be conducive to justice.

If the essence of international public policy is that 'it is only where the award violates internationally accepted standards of justice that enforcement will be refused',<sup>344</sup> then the public policy exception should not exclude transnational public policy.

### 3.7 CONCLUSIONS

The inescapable and undesirable conclusion is that the unruly horse of public policy is yet to be kept in control. The current categorisation of public policy as domestic, international, multinational and transnational, risks making the public policy exception (or the application of that exception) more unruly. Furthermore, the exclusion of transnational public policy from the public policy exception risks injustice.

This Chapter has highlighted the main problems arising from the current categories of public policy. Each of these categories raises interpretational questions, and their interaction and assimilation with each other have led to disagreement and bewilderment among judges, arbitrators and commentators.

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<sup>344</sup> Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' [2002] 3 *Melbourne Journal of International Law* 400, 405.



The drafters of the Model Law deliberately avoided using the imprecise concept of ‘international public policy’. While the ILA Resolution endeavours to provide a workable definition of international public policy, it is nevertheless predicated on the same categorisation of public policy, and therefore cannot overcome or avoid all the defects inherent in such categorisation.

Acknowledging or assuming that the current categories of public policy will endure, and that the public policy exception will continue to be confined to the enforcement State’s international public policies, this Chapter recommends two exceptions to, or qualifications of, this general rule.

First, in the interests of preserving justice and faith in arbitration, the enforcement court should apply the enforcement State’s international public policies in conjunction with, and subject to, transnational public policies.

Second, the enforcement court may consider the public policies of other countries for the purposes of assessing whether the enforcement State’s public policy is sufficiently fundamental, or is otherwise appropriate to fall within the public policy exception; as well as assessing whether other countries’ public policies represent transnational public policies which should override the enforcement State’s international public policies.

Chapter 4 is more ambitious. It explores the perplexing relationship between public policy and mandatory rules, which is another reason why public policy remains an unruly horse. Since mandatory rules are also affected by the dubious domestic-international dichotomy, Chapter 4 will suggest an alternative approach to defining the scope of the public policy exception, which avoids the controversial word ‘international’, and which confines the public policy exception to ‘mandatory rules of public policy’. It aims to develop a workable definition of ‘public policy’ in the context of the public policy exception for Australia.

## CHAPTER 4

### SADDLING THE UNRULY HORSE – PUBLIC POLICY & MANDATORY RULES

#### 4.1 INTRODUCTION

Neither the New York Convention nor the Model Law expressly specifies violation of mandatory rules as a separate and independent ground for challenging the enforcement of arbitral awards. Perhaps this is partly because some mandatory rules already fall within the public policy exception to the enforcement of arbitral awards. Anti-trust law, environmental law, import-export rules, foreign exchange regulations, competition law, taxation law, expropriation law, measures of embargo, blockade or boycott – all are examples of both public policy<sup>345</sup> and mandatory rules.<sup>346</sup>

The Australian Law Reform Commission also describes mandatory rules as the ‘crystalised rules of public policy’.<sup>347</sup> Indeed, mandatory rules embody, or at least exemplify, public policies. Nonetheless, not all mandatory rules are public policy. And not all violations of the enforcement State’s mandatory rules would lead to non-enforcement of awards under the public policy exception.

This Chapter explores the distinction and interaction between public policy and mandatory rules. It recommends the concept of ‘mandatory rules of public policy’ as an alternative means for delimiting the scope of the public policy exception.

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<sup>345</sup> See ILA Resolution Rec 1(e); ILA Final Report 256; Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 851 para 1521.

<sup>346</sup> Abdul Maniruzzaman, 'International Arbitration and Mandatory Public Law Rules in the Context of State Contracts: An Overview' <<http://www.kluwerarbitration.com>> at 17 November 2003.

<sup>347</sup> Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) para 5.11.

## 4.2 PUBLIC POLICY vs MANDATORY RULES

The previously mentioned cases such as the Korean case of *Adviso* and the Indian case of *Renusagar* illustrate that contravention of the enforcement State's mandatory rules may be insufficient for establishing the public policy exception.<sup>348</sup>

On the other hand, the ECJ's decision in the *Eco Swiss case* illustrates that a mandatory rule which is 'of a fundamental character' may be part of multinational public policy and thereby pertains to the public policy of the member States.<sup>349</sup> Violation of such a mandatory rule may fall within the public policy ground for annulment, and possibly also the public policy ground for non-enforcement.<sup>350</sup> However in the *Eco Swiss case*, the ECJ did not articulate how mandatory rules such as Art 81 of the EC Treaty<sup>351</sup> could be characterised as public policy, as it did not need to determine whether other provisions of the EC Treaty would also qualify as public policy.<sup>352</sup> Nor did the ECJ explicitly regard Art 81 as being part of the EU member States' international public policy, as it did not address the categories of public policy.

The question remains – to what extent do mandatory rules fall within the public policy exception to the enforcement of arbitral awards?

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<sup>348</sup> For the relevant discussions on *Adviso NV v Korea Overseas Construction Corp*, Supreme Court of Korea, 14 February 1995, extract in Yearbook Commercial Arbitration XXI (1996, Korea No. 3) <<http://www.kluwerarbitration.com>> at 18 November 2003, see Chapter 2 section 2.2.3(a).

In *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22, paras 38-39) <<http://www.kluwerarbitration.com>> at 26 July 2004, the Indian Supreme Court rejected the alleged contravention of India's Foreign Exchange Regulation Act and commented: "contravention of law alone will not attract the bar of public policy and something more than contravention of law is required..... 'public policy' in [the public policy exception] has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India."

<sup>349</sup> *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, as discussed in Chapter 3 section 3.5.1.

<sup>350</sup> Diederik De Groot, 'The Impact of the Benetton Decision on International Commercial Arbitration' (2003) 20 *Journal of International Arbitration* 365.

<sup>351</sup> *Treaty Establishing the European Community 1957* (Rome, 25 March 1957). As previously mentioned in Chapter 3 section 3.5.1, Art 81 of the EC Treaty is a provision against anti-competition.

<sup>352</sup> See the critique in Christoph Liebscher, 'European Public Policy after Eco Swiss' (1999) 10 *American Review of International Arbitration* 81, 85: the ECJ has not shown that Art 81 is such mandatory rule of a fundamental character and therefore pertains to public policy. The fact that agreements prohibited by a statutory provision are automatically void may not be sufficient to qualify this rule as 'public policy'.

#### 4.2.1 ‘*Ordre public*’ – public policy and/or mandatory rules?

The civil law distinction between ‘*ordre public interne*’ and ‘*ordre public international*’ has been translated as the distinction between ‘domestic public policy’ and ‘international public policy’, as well as the distinction between ‘domestically (or domestic) mandatory rules’ and ‘internationally (or international) mandatory rules’.<sup>353</sup> The former translation is commonly used in the context of arbitration, while the latter translation is frequently used in the context of litigation. However, it has also been said that:

“Domestic public policies cover ‘all mandatory provisions of domestic legislation’ whereas international public policies are ‘public policy rules specifically established in domestic legislation for international relationships’.”<sup>354</sup>

To further complicate the terminology, the French term ‘*lois de police*’ has been translated as ‘mandatory rules of law’,<sup>355</sup> and more recently, as ‘public policy rules’ in the ILA Resolution.<sup>356</sup> It acknowledges the distinction ‘between the group of mandatory rules and the much smaller group of fundamental rules of public policy’.<sup>357</sup>

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<sup>353</sup> AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 98.

See also the distinction in the *Rome Convention on the Law Applicable to Contractual Obligations* (1980) ILM 1492. Article 3 of the Rome Convention refers to domestic rules of a legal system which parties cannot set aside or vary by their agreement (ie mandatory rules in the domestic sense), whereas Art 7 refers to the rules which are applicable despite any rule of private international law to the contrary (ie mandatory rules in the international sense). See further discussions in Peter Nygh, *Choice of Forum and Laws in International Commercial Arbitration* (1997) 24.

<sup>354</sup> See the debate on the public policy exception in Draft Art 17 bis of the Model Law (concerning recognition and enforcement of interim measures of protection) in *Report of the Working Group on Arbitration on the Work of its 38<sup>th</sup> Session*, UN GA, 36<sup>th</sup> session, UN Doc A/CN.9/524 (2 June 2003) para 38. The UNCITRAL Working Group on Arbitration has adopted the substance of the public policy exception without change: see *Settlement of Commercial Disputes – Interim Measures of Protection – Note by the Secretariat*, UN GA, 43<sup>rd</sup> session, UN Doc A/CN.9/WG.II/WP.138 (8 August 2005) para 57.

<sup>355</sup> See, eg. Daniel Hochstrasser, ‘Choice of Law and “Foreign” Mandatory Rules in International Arbitration’ (1994) 11 *Journal of International Arbitration* 57, 67.

<sup>356</sup> See ILA Resolution Rec 1(d)(ii).

In addition, the civil law concept of ‘*lois d’ordre public*’ has also been confusingly translated as both ‘mandatory rules’ and ‘public policy rules’: AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 90 and 94.

<sup>357</sup> Christoph Liebscher, ‘European Public Policy after Eco Swiss’ (1999) 10 *American Review of International Arbitration* 81, 84.

It is uncertain whether these translational or terminological inconsistencies represent conceptual differences. In any event, it is necessary to reconcile these inconsistencies in order to minimise interpretational discrepancies. One potential solution is the concept of ‘mandatory rules of public policy’, which is inspired by, but slightly differs from, the ILA’s concept of ‘public policy rules’.<sup>358</sup>

#### **4.2.2 ILA’s distinction between ‘public policy rules’ & ‘(mere) mandatory rules’**

‘Public policy rules’ represent one of the ILA’s three categories of international public policy. They are rules ‘forming part of’ an enforcement State (and the laws of that State), which are ‘designed to serve the essential political, social or economic interests’ of that State.<sup>359</sup>

Recommendation 3(b) of the ILA Resolution states that only a manifest disruption of a public policy rule would bar enforcement. It reinforces Recommendation 3(a), which states:

“An arbitral award’s violation of a mere ‘mandatory rule’ (ie a rule that is mandatory but does not form part of the State’s international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.”

In other words, an arbitral award should not be denied enforcement merely because it violates a mandatory rule of a certain law area (including the enforcement State), unless such a mandatory rule is also a public policy rule of the enforcement State.

Unfortunately, the ILA Resolution does not further explore the distinction between ‘mere mandatory rules’ and ‘public policy rules’. It simply defines mere mandatory rule as a rule that is mandatory but does not form part of the enforcement State’s international public policy. As stated in the ILA Interim Report:

“Put most simply: every public policy rule is mandatory, but not every mandatory rule forms part of public policy.”<sup>360</sup>

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<sup>358</sup> See section 4.3 of this Chapter – ‘The mandatory rules of public policy exception’.

<sup>359</sup> ILA Resolution Recs 1(d)(ii) and 3(b).

<sup>360</sup> ILA Interim Report 231.

This has also been said elsewhere.<sup>361</sup> Yet it still begs the question: when and how does a ‘mandatory rule’ form part of the enforcement State’s public policy and thereby become a ‘public policy rule’? A starting point is to ascertain the meaning of ‘mandatory rules’.

#### 4.2.3 Defining ‘mandatory rules’

Despite their various expressions,<sup>362</sup> mandatory rules are commonly understood as rules which cannot be excluded by the parties’ agreement,<sup>363</sup> and which may apply alternatively (or at least additionally) to the parties’ chosen law. These rules are so important that they are applicable in spite of, and even independent of, any choice of law process.

Consider a hypothetical scenario involving a contractual dispute between a seller in Nation A and a buyer in Nation B. Assume that the parties have chosen the law of Nation B to govern their contract. Assume also that the parties have resorted to litigation and a court in Nation A is hearing the matter. The forum court (ie the court in Nation A) may refuse to apply the parties’ chosen law of Nation B on the basis that such foreign law is contrary to the mandatory rules of the forum (ie Nation A).

Alternatively, the forum court may simply apply certain parts of Nation A’s law on the basis that these laws are the mandatory rules of the forum, notwithstanding the parties’ choice of Nation B’s law. In this context, the forum court treats its own mandatory rules as internationally mandatory – that is, rules which apply extra-territorially to transactions involving foreign elements. Like public policy, the domestic-international distinction also applies to mandatory rules. ‘Domestically mandatory rules’ can apply only as part of the governing law, whereas ‘internationally mandatory rules’ may apply

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<sup>361</sup> See, eg, Karl-Heinz Bockstiegel, ‘Public Policy and Arbitrability’ in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 177, 183; Vesselina Shaleva, ‘The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia’ (2003) 19 *Arbitration International* 67, 72.

<sup>362</sup> For examples, mandatory rules have been expressed as ‘directly applicable rules’, ‘self-applicating rules’, ‘absolute rules’, ‘peremptory norms’, ‘imperative norms’ and ‘overriding statutes’: see AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 90-91.

The mirroring civil law terminologies include ‘*regles d’application immediate*’, ‘*regles d’application necessaire*’ and ‘*norme imperative*’: see Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2<sup>nd</sup> ed, 2001) 504 para 18.2.

<sup>363</sup> ILA Final Report 261.

irrespective of whether they are part of the governing law. For instance, internationally mandatory rules can apply as part of the forum law. Presumably this is one of the reasons why the distinction between *ordre public interne* and *ordre public international* has been translated as the distinction between domestic and international public policies, as well as the distinction between domestically and internationally mandatory rules.

Since most (if not all) of the mandatory rules are sourced in statute, the question of whether a particular statutory rule is domestically or internationally mandatory will depend on the scope and purpose of that rule, which is essentially a question of statutory interpretation.<sup>364</sup>

On the other hand, one must also differentiate between ‘forum’ and ‘foreign’ mandatory rules. This distinction is also known as the distinction between ‘mandatory rules of the *lex fori*’ (forum mandatory rules) and ‘mandatory rules of foreign law’ (foreign mandatory rules).<sup>365</sup> The former consists of the mandatory rules of the forum (ie the place of the judicial proceedings), whereas the latter consists of the mandatory rules of another law area. For instance, the applicable mandatory rules of Nation A in the above hypothetical scenario are ‘forum mandatory rules’ whereas the mandatory rules of Nation B would be regarded as ‘foreign mandatory rules’ by the court in Nation A.

The forum-foreign distinction seldom applies to arbitration, at least from the arbitrators’ perspective. This is because arbitrators, unlike judges, do not have a ‘forum’ even though they conduct arbitral proceedings in a particular place.<sup>366</sup> Nor do they owe any allegiance to any place which requires them to apply the mandatory rules of that place.

By contrast, judges are obliged to apply the mandatory rules of their forum and they are the guardians of their forum’s public policies.<sup>367</sup> Accordingly, the forum-foreign distinction also applies to judges when determining the enforceability of arbitral awards

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<sup>364</sup> AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 98 and 102.

<sup>365</sup> Pierre Mayer, ‘Mandatory Rules of Law in International Arbitration’ (1986) 2 *Arbitration International* 274, 283.

<sup>366</sup> Julian Lew, *Applicable Law in Commercial Arbitration: A Study in Commercial Arbitration Awards* (1978) 535 para 408; Nathalie Voser, ‘Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration’ (1996) 7 *American Review of International Arbitration* 319.

<sup>367</sup> *Ibid.*

under the public policy exception. The ‘international public policy’ of the enforcement State is analogous to the internationally mandatory rules of the forum.

Interestingly, despite the increasing conflation of private international law and public international law, the word ‘transnational’ is currently confined to ‘transnational public policy’, and is yet to extend to mandatory rules. This leads to further discussions on the extent of the overlap between public policy and mandatory rules.

#### 4.2.4 Distinction & interaction between public policy & mandatory rules

The following table summarises the main differences and similarities between public policy and mandatory rules.

	Public Policy	Mandatory Rules
<b>Differences</b>	Wide variety of sources (eg statutory and case law)	Statutory sources only?
	Affect both enforcement and choice of law issues	Affect choice of law issues only?
	Transnational public policy may not pertain to any law area	Pertain to a particular law area
	May not be regarded as ‘law’	Status of ‘law’
<b>Similarities (or areas of overlap)</b>	<ul style="list-style-type: none"> <li>▪ Fundamentality – both serve a law area’s essential interests</li> <li>▪ Domestic-international dichotomy</li> <li>▪ Limit on party autonomy</li> <li>▪ Mandatory rules of a public policy nature or public policy expressed as mandatory rules – mandatory rule can be a source of public policy and public policy can be the content of mandatory rule</li> </ul>	

Most public policies and mandatory rules protect or represent interests that are fundamental to their pertaining law area. Consequently, both public policies and mandatory rules may apply even when their law area is not the place of the governing law, provided that their law area is the forum. In other words, both may apply as part of the forum law irrespective of the governing law (which is usually a foreign law). Continuing with the preceding hypothetical scenario, the court in Nation A may refuse to apply the parties’ chosen law of Nation B on the basis that such foreign law is contrary to Nation A’s public policy and/or mandatory rules.



Alternatively or additionally, the court in Nation A may refuse to apply Nation B's law on the basis that the parties' choice cannot avoid the application of Nation A's mandatory rules. This is because the parties' choice of law must be bona fide, legal, and not contrary to the public policy of the forum.<sup>368</sup>

Thus the main similarity between public policy and mandatory rules is their overlapping function in the choice of law process. However, their function in choice of law slightly differs. Mandatory rule serves a 'positive' function in the sense of superimposing the rule irrespective of the applicable foreign law, whereas public policy serves a 'negative' function in the sense of excluding or rejecting the application of the foreign law (which is otherwise applicable).<sup>369</sup>

Furthermore, unlike mandatory rules, public policy also plays an important role in the enforcement process. As previously mentioned, contravention of mandatory rules is not an express exception to the enforcement of arbitral awards. Yet the overlap between mandatory rules and public policy means that contravention of some mandatory rules may fall within the public policy exception. Such mandatory rules are known as 'mandatory rules of a public policy nature',<sup>370</sup> or the ILA's notion of 'public policy rules'.

This leads to another difference between public policy and mandatory rules. Mandatory rules can have 'a broader content',<sup>371</sup> even though public policy derives from a wider variety of sources. For instance, mandatory rules can also be of a 'policing nature', and are not confined to the principles 'pertaining to justice or morality'.<sup>372</sup> This reinforces

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<sup>368</sup> For instance, in *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378, the Queensland Supreme Court held that the parties' choice of foreign law was not bona fide and was contrary to Queensland public policy. This decision could have been predicated on the ground that the relevant Queensland real estate legislation contains mandatory rules which are applicable by their own force whatever the governing law of the parties' contract: see the discussions in Edward Sykes and Michael Pryles, *Australian Private International Law* (3<sup>rd</sup> ed, 1991) 598-599.

See also *Vita Food Products v Unus Shipping Co Ltd* [1939] AC 277.

<sup>369</sup> The International Court of Justice has recognised public policy as a 'near universal' ground for the exclusion of foreign law: see *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (The Netherlands v Sweden) (1958) ICJ 55, 94 (Judge Sir Hersch Lauterpacht).

<sup>370</sup> Marc Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14 *Journal of International Arbitration* 39, 61.

<sup>371</sup> Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 319.

<sup>372</sup> See ILA Resolution Rec 1(d); AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 88.

the ILA's view that 'not every mandatory rule forms part of public policy'. Yet the reverse of this view also applies – not every public policy is a mandatory rule.

It is suggested that the extent of the overlap between public policy and mandatory rules may appropriately define the scope of the public policy exception to the enforcement of arbitral awards. In other words, the phrase 'public policy' in the public policy exception may be confined to 'mandatory rules of public policy'.

Before exploring the concept of 'mandatory rules of public policy', the following is an attempt to reconcile, or at least to clarify, the various terms in the ILA Resolution.

- **'Mere mandatory rules'** are mandatory rules which do not form part of the forum's public policy, or which are not of a public policy nature.
- **'Public policy rules'** are mandatory rules which form part of the forum's public policy, or which are of a public policy nature. They are public policies which are also mandatory rules.
- **'Public policy'** includes 'public policy rules' (which are also mandatory rules) and other public policies which are not mandatory rules. Both types of public policy may affect choice of law. For instance, both may justify the application of the forum law instead of, or in addition to, the foreign law.
- **'Mandatory rules'** include 'public policy rules' (which are part of the forum's public policy) and 'mere mandatory rules' (which are not part of the forum's public policy). Both types of mandatory rules, like the two types of public policy, may affect choice of law. However, only public policy rules can affect enforcement, specifically the enforcement of arbitral awards.

### 4.3 THE ‘MANDATORY RULES OF PUBLIC POLICY’ EXCEPTION?

The concept of ‘mandatory rules of public policy’ represents ‘a hybrid between public policy and mandatory rules’,<sup>373</sup> and is inspired by the ILA’s concept of ‘public policy rules’. Nevertheless, it seeks to avoid or address two problems inherent in the ILA’s concept.

Firstly and as previously mentioned, the ILA Resolution provides no guidance on how to differentiate between ‘public policy rules’ (which may bar enforcement of arbitral awards) and ‘mere mandatory rules’ (which cannot bar enforcement of arbitral awards). This leads to the second problem that the enforcement court may interpret mere mandatory rules as public policy rules,<sup>374</sup> and thereby expand the scope of the public policy exception contrary to the pro-enforcement policy of the New York Convention.

After recognising the overlap between public policy and mandatory rules, and after identifying the extent of such overlap, the next step is to use these overlapping features to delimit the scope of the public policy exception. To this end, the concept of ‘mandatory rules of public policy’ is primarily based on the common denominators of public policy and mandatory rules.

#### 4.3.1 Defining ‘mandatory rules of public policy’

The word ‘**mandatory**’ means that the relevant public policy is applicable irrespective of whether the arbitral awards, proceedings or disputes are subject to the laws of other countries, or are otherwise connected to other countries. It incorporates the concepts of extra-territoriality, fundamentality, as well as the nexus requirement.<sup>375</sup>

The word ‘**rules**’ emphasises that the relevant public policy has the status or force of law, which is stronger than public interest and political policy. The public policy exception should be confined to the ‘explicit’, ‘well defined and dominant’ public

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<sup>373</sup> Kenneth Curtin, ‘Redefining Public Policy in International Arbitration of Mandatory National Laws’ (1997) 64 *Defense Counsel Journal* 271.

<sup>374</sup> AN Zhilsov, ‘Mandatory and Public Policy Rules in International Commercial Arbitration’ (1995) 42 *Netherlands International Law Review* 81, 102.

<sup>375</sup> As explained in Chapter 2 section 2.2, the extra-territorial application of a public policy should be based on the fundamentality of that public policy, and/or a sufficient connection between the forum (containing that public policy) and the relevant arbitral award, proceedings or dispute.

policies which are ‘ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests’.<sup>376</sup>

Although some judges use ‘public policy’ interchangeably with ‘public interest’,<sup>377</sup> however these terms are not synonymous, as the latter term has a wider meaning and may therefore be too wide a criterion for the public policy exception. Similarly, while public policy may include the essential political interests of a country, ‘political policy’ may be an excessively wide, arbitrary, and therefore inappropriate criterion for the public policy exception.<sup>378</sup>

It follows that confining the public policy exception to public policy in a strict legal sense (as represented by the word ‘rules’) implements the concept of fundamentality, which justifies or requires the extra-territorial application of public policy. Indeed, public interests (whether political, social or economic) that are sufficiently fundamental to a country, are usually expressed or embodied in the legislative instruments of that country, or expressly recognised by the judicial decisions of that country. Owing to the temporal relativity of public policy, the legislature and judiciary of that country would usually repeal rules which express or embody public policies that are no longer sufficiently fundamental, or are otherwise inapplicable.

This leads to the phrase ‘**public policy**’, which indicates that mandatory rules expressing or embodying public policy are not confined to statutory sources of law. This is because virtually all mandatory rules are statutory whereas the sources of public policy are more diverse. Confining the sources of public policy would ensure that the public policy exception is appropriately narrow, in light of the New York Convention’s pro-enforcement policy.

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<sup>376</sup> See the US cases on labour arbitration cited in Chapter 2 section 2.2.1(c) footnote number 143.

This standard would be ‘more susceptible to objective determination’ than ‘the more poetic but unfortunately subjective standard requiring reference to fundamental principles of justice, good morals and deep-rooted traditions’: see Robert Barry, ‘Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards under the New York Convention: A Modest Proposal’ (1978) 51 *Temple Law Quarterly* 832, 851.

<sup>377</sup> See, eg, *Bunning v Cross* (1978) 141 CLR 54, 64 (Barwick CJ); *Arthur JS Hall & Co v Simons* [2000] 3 WLR 543, 584 (Lord Hope of Craighead), as cited in Justice GN Williams, ‘Importance of Public Policy Considerations in Judicial Decision-Making’ (2000) *International Legal Practitioner* 134, 136 and 138.

<sup>378</sup> See, eg, *Parsons & Whittemore Overseas Co Inc v Societe Generale de l’Industrie du Papier*, 508 F 2d 969 (2<sup>nd</sup> Cir, 1974), as discussed in Chapter 2 section 2.2.3(a) – ‘Fundamentality: Case illustrations’.

Ideally, public policy should be sourced in statutory instruments, which comprise the legislative instruments of the enforcement State, international conventions, treaties, model laws and other international instruments adopted by the enforcement State or by the international community as a whole. Judicial decisions, including those of the various national courts, the European Court of Justice and the International Court of Justice, can also be a source of public policy, as they often clarify or confirm the meaning and scope of a particular public policy embodied in international treaties or other statutory instruments.<sup>379</sup>

Thus this thesis defines ‘mandatory rules of public policy’ as rules intended to encompass the arbitral award, proceedings or dispute under consideration,<sup>380</sup> as expressed or embodied in the enforcement State’s statutory and case law, as well as in the international instruments and customs adopted or otherwise recognised by the enforcement State.

Using the current terminology solely for comparative purposes, ‘mandatory rules of public policy’ are akin to ‘internationally mandatory rules’ which are of a public policy nature, or ‘international public policy’ derived from restricted sources. The ideal is to avoid using words such as ‘international’ and ‘internationally’ when characterising public policy or defining the scope of the public policy exception.

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<sup>379</sup> Civil law judges may be reluctant to develop public policies not referred to in civil law codes or statutes, whereas common law judges may be more willing to do so. This is because the civil law (inquisitorial) systems are ‘closed’ in the sense that their primary source of law is statutes, some of which are exhaustive. By contrast, the common law (adversarial) systems are ‘open’ in the sense that there is more scope for judicial activism or law-making, with case law being the primary source of law, as supplemented and modified by statutes. See William Tetley, William, ‘Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)’ (2000) 60 *Louisiana Law Review* 677, especially 703-706.

However, the process of internationalisation parallels the growing convergence between these two systems of law – ‘each seeks to emulate the best practices of each other’. The emerging ‘hybrid forms of adversarial and inquisitorial methods’ (or ‘mixed jurisdictions’) may assist with harmonising judicial approaches to the public policy exception. See James Crawford and Brian Opeskin, *Australian Courts of Law* (4<sup>th</sup> ed, 2004) 62-63.

<sup>380</sup> This phrase has been inspired by the terminology in ILA Resolution Rec 3(b) – ‘intended to encompass the situation under consideration’.

### 4.3.2 Why ‘mandatory rules of public policy’?

Confining the public policy exception to ‘mandatory rules of public policy’ has the following advantages:

- Non-exhaustive definition of the sources of public policy which recognises the interaction between national and international sources of public policy, particularly due to the increasing assimilation between private international law and public international law;
- Greater ease in ascertaining or verifying the existence and scope of the alleged public policy;
- Insistence on ‘rules’ of public policy to exclude public interests, political policies, and other policies which lack the requisite fundamentality or nexus requirement, and therefore do not qualify for the public policy exception;
- Less need to distinguish between ‘mere mandatory rules’ (which fall outside the public policy exception) and ‘public policy rules’ (which fall within the public policy exception); and
- Compatibility between the above features and the continuing preference for a narrow public policy exception in accordance with the New York Convention’s pro-enforcement policy.

The definition of ‘mandatory rules of public policy’ also addresses the need for allowing certain public policies that are not part of the enforcement State in the strict legal or technical sense, but should nevertheless be applicable in the interests of justice. For instance, the so-called ‘transnational public policy’ may be appropriate in certain circumstances as it may lead the judges to ‘disregard the particular selfish interest of a given State in order to respect the superior values of the international community’.<sup>381</sup>

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<sup>381</sup> Pierre Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 259, 315. See the previous discussions in Chapter 3 section 3.6.6 – ‘Revisiting transnational public policy’.

#### 4.4 NARROW APPROACH TO THE PUBLIC POLICY EXCEPTION FOR AUSTRALIA?

As previously mentioned, the Australian High Court has merely referred to the distinction between *ordre public interne* and *ordre public international* in the *Akai case*.<sup>382</sup> This reference was made in the context of choice of law in litigation involving foreign elements, specifically the forum court's exclusion of a foreign law which is contrary to the forum's public policy, and the application of the forum's mandatory rules notwithstanding the parties' choice of foreign law.

The Australian High Court is yet to extend the domestic-international distinction to the enforcement of foreign judgments, let alone the enforcement of foreign awards. It is yet to comment on the narrow approach to the public policy exception. However, other Australian courts have endorsed a narrow definition of 'public policy' and even implicitly endorsed the concept of international public policy – at least in the context of determining the enforceability of foreign judgments.

##### 4.4.1 Australian cases concerning the public policy exception to the enforcement of foreign judgments

As mentioned in Chapter 1, public policy is one of the exceptions to the enforcement of foreign judgments under the Australian common law.<sup>383</sup> There is also a similar statutory provision which requires Australian courts to set aside a registered foreign judgment if the enforcement of that judgment 'would be contrary to public policy'.<sup>384</sup>

In *Stern v National Australia Bank* (the *Stern case*), Tamberlin J in the Federal Court stated that the meaning of 'public policy' is 'narrower and more limited in private international law than in municipal law'.<sup>385</sup> Implicit in this statement is the recognition of the distinction between domestic and international public policies. Tamberlin J also acknowledged the concept of fundamentality:

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<sup>382</sup> See *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418, as discussed in Chapter 3 section 3.3.2 – 'Challenges arising from the domestic-international dichotomy'.

<sup>383</sup> See Chapter 1 section 1.2.1 – 'Australian law on enforcement of arbitral awards: Mechanics of enforcement'.

<sup>384</sup> *Foreign Judgments Act 1991* (Cth) s 7(2)(xi).

<sup>385</sup> *Stern v National Australia Bank* [1999] FCA 1421, para 140. The Full Federal Court subsequently affirmed Tamberlin J's decision: see *Stern v National Australia Bank* [2000] FCA 294.

“The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence. A number of cases involve questions of moral and ethical policy; fairness or procedure, and illegality, of a fundamental nature.”<sup>386</sup>

The Queensland Supreme Court agreed in *De Santis v Russo*, reiterating that the courts are ‘slow’ to invoke public policy to deny enforcement of foreign judgments, and that ‘much more must be shown than the applicable legal rules are different’.<sup>387</sup> In other words, mere conflict between forum law and foreign law may not suffice. After applying the criteria in the *Stern* case, Atkinson J refused to de-register a foreign judgment which did not offend ‘the essential principles of justice and morality’, nor would the enforcement of that judgment ‘lead to an unacceptably unjust result’.<sup>388</sup> Atkinson J also cited three circumstances which may justify non-enforcement of a foreign judgment:<sup>389</sup>

- First, the foreign law is ‘unacceptably repugnant’, as, for instance, it permits contracts for the sale of slaves. While Australian courts may be cautious (and even reluctant) to compare foreign law with Australian law,<sup>390</sup> a foreign law which is ‘unacceptably repugnant’ can nevertheless violate Australian public policy, and even transnational public policy.

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<sup>386</sup> *Stern v National Australia Bank* [1999] FCA 1421, para 143.

At para 141, Tamberlin J cited the phraseology in *Loucks v Standard Oil Co of New York* (1918) 224 NY 99, 111: “violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal”. This resonates with the notion of ‘the most basic notions of morality and justice’ in the later US case of *Parsons & Whittemore Overseas Co Inc v Societe Generale de l’Industrie du Papier*, 508 F 2d 969 (2<sup>nd</sup> Cir, 1974).

<sup>387</sup> *De Santis v Russo* [2001] QSC 65, paras 19 and 18.

<sup>388</sup> *Ibid*, para 22.

In *De Santis v Russo*, Atkinson J refused to set aside the registration of an Italian judgment despite the allegedly significant differences between Australian law and Italian law as to the maintenance of children. The Queensland Court of Appeal subsequently upheld this decision: see *De Santis v Russo* [2001] QCA 457.

<sup>389</sup> *De Santis v Russo* [2001] QSC 65, para 21 (citing PB Carter, ‘The role of public policy in English Private International Law’ (1993) 42 *International Commercial Law Quarterly* 1).

<sup>390</sup> See, eg, McPherson JA in *De Santis v Russo* [2001] QCA 457, para 7: “it would be wrong for this court to make policy strictures on the legal system of another country without having an informed understanding of the philosophy or rationale that underlies the legal rules in question and how they compare with our own.”



- Second, the enforcement court ‘would be required to act in a way which would jeopardise national interests’ (eg the *Spycatcher case*).<sup>391</sup> Australian courts are equally (if not more) reluctant to comparatively evaluate between Australian and foreign governmental or public interests. This indicates that Australian courts may, like the US court in the *Parsons case*,<sup>392</sup> refuse to recognise certain political interests or policies as falling within the public policy exception.

Another implication is that Australian courts may be reluctant to deny enforcement under the public policy exception, because of their desire to avoid deciding whether an Australian public policy is more fundamental than, and should therefore override, a competing foreign public policy. Perhaps this is where transnational public policy may be helpful – the public policy which accords with a comparable transnational public policy should prevail.<sup>393</sup>

- Third, enforcing the foreign judgment ‘would lead to an unacceptably unjust result’. This endorses the primary submission in this thesis – namely, the prevention and sanction of injustice should be the ultimate and overriding objectives when applying the public policy exception.

In the interests of simplicity, consistency and convenience, Australian courts are likely to adopt similar approaches to public policy in determining the enforceability of both foreign judgments and foreign awards. This is subject to other enforcement-related provisions and features in the New York Convention, as Chapter 5 will explore. Meanwhile, it is appropriate to elaborate on ‘mandatory rules of public policy’ as an alternative approach to delimiting the scope of the public policy exception.

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<sup>391</sup> *Attorney-General (United Kingdom) v Heinemann Publishers Australian Pty Ltd* (1988) 165 CLR 30, as briefly discussed in Chapter 3 section 3.3.2 – ‘Challenges arising from the domestic-international dichotomy’.

<sup>392</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969 (2<sup>nd</sup> Cir, 1974), as discussed in Chapter 2 section 2.2.3(a) – ‘Fundamentality: Case illustrations’.

<sup>393</sup> See the previous discussions in Chapter 3 section 3.6.6 – ‘Revisiting transnational public policy’.

#### **4.4.2 An alternative approach to defining the scope of the public policy exception**

The current approach is to define the scope of the public policy exception by reference to the overlapping categories of domestic, international, multinational and transnational public policy, and to confine the public policy exception to ‘international public policy’ of the enforcement State. The suggested alternative approach is to confine the public policy exception to ‘mandatory rules of public policy’.

This thesis defines ‘mandatory rules of public policy’ as rules intended to encompass the arbitral award, proceedings or dispute under consideration, as expressed or embodied in the enforcement State’s statutory and case law, as well as in the international instruments and customs adopted or otherwise recognised by the enforcement State. This definition incorporates the following essential elements or features of the public policy exception:

- Fundamentality – this is represented by the phrase ‘rules...as expressed or embodied’ in the specified sources. It intends to exclude political policies and public interests which are not sufficiently important to the enforcement State or the international community when balanced against the New York Convention’s pro-enforcement policy.
- Extra-territoriality and nexus requirement – this is represented by the phrase ‘intended to encompass the foreign arbitral award, proceedings or dispute under consideration’. There must be a sufficient connection between the enforcement State and the arbitral award, proceedings or disputes in order to justify the application of that State’s public policy to the enforcement of the relevant arbitral award.
- Timing – the phrase ‘intended to encompass’ also intends that the relevant mandatory rule of public policy remains, or is deemed to be applicable at the time of the enforcement proceedings (ie when the relevant award is sought to be enforced).
- Substance-procedure distinction – this is implicit in the phrase ‘arbitral award, proceedings or dispute’. Mandatory rules of public policy may concern the nature of the arbitral dispute, the conduct of the arbitral proceedings, and the contents of the arbitral award.

- Inclusion of transnational public policies or the public policies of other nations in appropriate circumstances – this is intended by the phrase ‘international instruments and customs adopted or otherwise recognised by the enforcement State’. It covers public policies that are not part of the enforcement State’s public policy in the strict legal or technical sense, but should nevertheless be applicable in the interests of justice.

## 4.5 CONCLUSIONS

Public policy has been, and may continue to be, an unruly horse, owing to its relativity and its diversity of sources, both of which contribute to the complexity in its interaction with mandatory rules, and its domestic-international-multinational-transnational categorisation.

Any definition of public policy, or any delimitation of the scope of the public policy exception, should represent an appropriate balance between respecting arbitral finality and party autonomy on the one hand, and preventing unjust, ‘perverse or prejudiced awards’,<sup>394</sup> on the other hand. It should maintain a balance between protectionism and liberalism, as well as between parochialism and globalism.

Determining the scope and applicability of the public policy exception is crucial for stage one of applying the public policy exception.<sup>395</sup> The narrow approach to the public policy exception confines this exception to certain public policies and mandatory rules. In this regard, this thesis has raised two contentions – why not ‘international public policy’ in Chapter 3, and why ‘mandatory rules of public policy’ in this Chapter. It recommends the Australian courts delimit the scope of the public policy exception by:

- Avoiding references to ‘international public policy’ and other related categories of public policy;
- Using the common denominators of public policy and mandatory rules (ie ‘mandatory rules of public policy’) and focusing on the concepts of fundamentality, extra-territoriality and the nexus requirement; and

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<sup>394</sup> ILA Final Report 253.

<sup>395</sup> Chapter 1 section 1.3.1 outlines the author’s three stages of applying the public policy exception.

- Defining (non-exhaustively) and confining the sources of public policies which may fall within the public policy exception.

***Recommendation 1: Scope of the public policy exception***

- (a) The term ‘public policy’ in the public policy exception (ie IAA s 8(7)(b), New York Convention Art V(2)(b), and Model Law Art 36(1)(b)(ii)) means ‘mandatory rules of public policy’.
- (b) ‘Mandatory rules of public policy’ are rules intended to encompass the arbitral award, proceedings or dispute under consideration, as expressed or embodied in the enforcement State’s statutory and case law, as well as in the international instruments and customs adopted or otherwise recognised by the enforcement State.
- (c) In the interests of consistency and convenience, IAA s 19 (which deems certain conduct to be contrary to Australian public policy for the purposes of the public policy exceptions in Model Law Arts 34 and 36) should extend to the public policy exception in IAA s 8(7)(b) and New York Convention Art V(2)(b).

Chapter 5 explores other enforcement-related provisions and features of the New York Convention, most of which are compromises between the competing interests in international commercial arbitration. These impact on all three stages in the judicial application of the public policy exception to the enforcement of arbitral awards.

## CHAPTER 5

### HARNESSING THE UNRULY HORSE – THE PUBLIC POLICY PARADOX OF THE NEW YORK CONVENTION

#### 5.1 INTRODUCTION

After ascertaining and clarifying the meaning of ‘public policy’ in the public policy exception to enforcement of arbitral awards, it is timely to examine additional provisions and features which influence the judicial approach to the public policy exception. These are the other exceptions to enforcement in the New York Convention, the Model Law provisions concerning the annulment of awards, and the textual differences between Australia’s *International Arbitration Act 1974* and the New York Convention. These provisions and features represent a compromise of competing interests in international commercial arbitration. They manifest the New York Convention’s public policy paradox.

This thesis refers to the ‘public policy paradox’ as the public policy exception to the pro-enforcement public policy of the New York Convention. Both the public policy exception and the pro-enforcement policy are paradoxically public policies themselves. This has created the perception that the public policy exception and the pro-enforcement policy are competing public policies serving competing interests. Many national courts have resolved this apparent conflict by deferring to the pro-enforcement policy, usually without exploring whether there is indeed a conflict of public policies.

By questioning ‘why a narrow approach to the public policy exception’, this Chapter explores the underlying rationales of both the pro-enforcement policy and the public policy exception. In doing so, it demonstrates the need to reorient the current perception of the public policy paradox. Instead of viewing the public policy exception as a limit on private interests (such as arbitral finality and party autonomy), or as a means of protecting public interests (such as sovereignty and anti-avoidance of juridical interests), it would be more constructive to view the public policy exception as promoting and maintaining a balance between these so-called competing interests. These interests are interdependent rather than incompatible – they can co-exist to maintain justice and faith in arbitration.

## 5.2 WHY A NARROW APPROACH TO THE PUBLIC POLICY EXCEPTION?

It has been said that public policy ‘should operate only as a shield to the enforcement of foreign awards which bear unwanted solutions’, and should not become ‘a sword in the hands of those who want to limit the mobility or finality of international awards’.<sup>396</sup> The pro-enforcement policy presumes arbitral awards to be enforceable as a general rule, subject to the specified exceptions to enforcement. The obligation in New York Convention Art III to recognise arbitral awards as binding and enforceable subject to Art V’s limited exceptions to enforcement evinces ‘a strong presumption’ in favour of enforcement.<sup>397</sup> In other words, enforcement of arbitral awards is mandatory under Art III, unless one of the Art V exceptions to enforcement applies. The narrow approach means that the specified exceptions to enforcement should be interpreted narrowly against non-enforcement (or in favour of enforcement).<sup>398</sup>

### 5.2.1 Why a pro-enforcement policy?

The essence of the pro-enforcement policy is respect for finality and enforceability of arbitral awards. It is part of the more general pro-arbitration policy which seeks to facilitate and promote arbitration as ‘a form of international commercial dispute resolution’.<sup>399</sup> The pro-arbitration policy seeks to enforce both arbitration agreements and arbitral awards, whereas the pro-enforcement policy focuses on the enforcement of arbitral awards.

The pro-enforcement policy is also based on, or related to, the following principles or concepts:

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<sup>396</sup> Loukas Mistelis, ‘Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards’ (2000) 2 *International Law Forum Du Droit International* 248, 248.

<sup>397</sup> Stephen Ostrowski and Yuval Shany ‘Chromalloy: United States Law and International Arbitration at the Crossroads’ (1998) 73 *New York University Law Review* 1650, 1657-1658; Richard Garnett, ‘International Arbitration Law: Progress Towards Harmonisation’ [2002] 3 *Melbourne Journal of International Law* 400, 404.

<sup>398</sup> Frank-Bernd Weigand (ed), *Practitioner’s Handbook on International Arbitration* (2002) 402.

According to Global Legal Group, *International Comparative Legal Guide to International Arbitration 2004* (2004), the majority of the commentators conclude that their countries have adopted a narrow and pro-enforcement approach to the enforcement of arbitral awards. These include Australia, Canada, England, France, Germany, Malaysia, Sweden, Switzerland, and the United States.

<sup>399</sup> *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, para 113.

- ‘Party autonomy’, specifically party autonomy in choice of forum and choice of law, means that the parties should be free and able to choose arbitration to resolve their disputes, to select the laws to govern their arbitration and contracts, as well as to select the places to enforce their arbitral awards and perform their contracts.
- ‘Comity’ means deference to, or respect for, foreign laws, as well as the capacities of foreign arbitral tribunals, courts and other institutions.<sup>400</sup> The related concept of ‘reciprocity’ instructs the courts to invoke the public policy exception with caution, ‘lest foreign courts frequently accept it as a defense to enforcement of arbitral awards’.<sup>401</sup>
- ‘Internationalism’ encourages judges to replace their ‘national or parochial inclination’<sup>402</sup> with ‘sensitivity to the need of the international commercial system for predictability in the resolution of disputes’.<sup>403</sup> The narrow (or pro-enforcement) approach is also known as the ‘internationalist approach’, which parallels the growing support for the delocalisation of arbitral awards in response to the process of internationalisation or globalisation.<sup>404</sup>

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<sup>400</sup> A Canadian court has defined ‘judicial comity’ as the ‘principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect’: see *TMR Energy Ltd v State Property Fund of Ukraine* (2004) NLSCD 198 (Newfoundland and Labrador Supreme Court, Hall J, 26 October 2004) para 65.

See also *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 629 (1985) (‘concerns of international comity, respect for the capacities of foreign and transnational tribunals’); Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalisation’ (2002) 40 *Columbia Journal of Transnational Law* 209, 226 (‘comity for foreign law and institutions’); Nina Hall, ‘Case Comment: Minmetals Germany GMGH v Ferco Steel Ltd’ (1999) 2 *International Arbitration Law Review* 78, 80 (‘non-interference in the supervision by foreign bodies of international arbitral processes’).

<sup>401</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l’Industrie du Papier*, 508 F 2d 969, 973-974 (2<sup>nd</sup> Cir, 1974).

<sup>402</sup> Michael Pryles, ‘Internationalism in Australian Private International Law’ (1989) 12 *Sydney Law Review* 96, 107. Pryles defines ‘internationalism’ as ‘the principle of community of interests or action between different nations’, which suggests ‘harmony attained by mutual recognition as opposed to diversity and isolationism founded on parochial attitudes’.

<sup>403</sup> *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 629 (1985).

<sup>404</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 460 para 10-31; Roger Haydock, ‘Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser’ (1996) 21 *William Mitchell Law Review* 867, 880; Michael Pryles, ‘Internationalism in Australian Private International Law’ (1989) 12 *Sydney Law Review* 96, 111.

This thesis does not examine the debate on ‘stateless’, ‘a-national’ or delocalised awards – see the relevant discussions in Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International*

Ironically, many countries have adopted the pro-enforcement policy because of their national economic and political interests in facilitating international commerce and dispute resolution.<sup>405</sup>

### 5.2.2 Why a public policy exception?

The public policy exception acknowledges 'the rights of the State and its courts to exercise ultimate control over the arbitral processes'.<sup>406</sup> It is often perceived as a threat or impediment to arbitral finality and party autonomy.<sup>407</sup> It is also seen as allowing parochialism to intersperse with internationalism and international comity.<sup>408</sup> Yet arbitral finality and party autonomy are not, and should not, be unlimited or unqualified. Nor is the public policy exception intended to protect the parochial or peculiar interests of the Convention countries. Instead, it protects the 'vital juridical interests'<sup>409</sup> of those countries.

The public policy exception is in the interests of the arbitration parties, as well as the arbitration system as a whole. It serves 'the higher purpose of ensuring that justice is done'.<sup>410</sup> It reflects the reality that arbitration can neither exist in a legal vacuum nor be 'entirely privatised', and that the survival of arbitration as a legitimate dispute

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*Commercial Arbitration* (2003) 67ff; Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 *Arbitration International* 19, 28ff; David Rivkin, 'Enforceability of Arbitral Awards Based on Lex Mercatoria' <<http://www.kluwerarbitration.com>> at 18 November 2003; Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 35ff and 373ff.

<sup>405</sup> Susan Choi, 'Judicial Enforcement of Arbitral Awards under the ICSID and New York Conventions' (1995-96) 28 *New York University Journal of International Law & Politics* 175, 207; Justice Andrew Rogers, 'The UNCITRAL Model Law: An Australian Perspective' (1990) 6 *Arbitration International* 348.

<sup>406</sup> ILA Interim Report 217.

<sup>407</sup> Diederik De Groot, 'The Impact of the Benetton Decision on International Commercial Arbitration' (2003) 20 *Journal of International Arbitration* 365; Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 *American Business Law Journal* 511, 513; AN Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81, 95.

<sup>408</sup> Michael Pryles, 'Internationalism in Australian Private International Law' (1989) 12 *Sydney Law Review* 96, 113.

<sup>409</sup> Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 204. See also Joel Junker, 'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards' (1977) *California Western International Law Journal* 228, 250.

<sup>410</sup> Diederik De Groot, 'The Impact of the Benetton Decision on International Commercial Arbitration' (2003) 20 *Journal of International Arbitration* 365. See also John Mo, *International Commercial Law* (3<sup>rd</sup> ed, 2003) 729 para 12.104.



resolution system depends on its respect for vital juridical interests.<sup>411</sup> Both arbitrators and judges play an important role in this regard.

The arbitrators resolve disputes in accordance with the parties' legitimate interests and expectations. Such interests do not include unjust enrichment of one party at the expense of the other party. Furthermore, despite their duty to render enforceable awards, arbitrators cannot be expected to identify all potential enforcement States and thereby comply with, or at least consider, the mandatory laws and public policies of those States.<sup>412</sup>

Accordingly, the enforcement courts play the role of upholding the enforcement States' mandatory laws and public policies. Their role is both supportive and corrective – they enforce awards, except those which would undermine justice, integrity, or faith in arbitration.

By preventing and sanctioning injustice in arbitration, the public policy exception seeks to promote, rather than diminish, public confidence in arbitration 'as an effective and fair means of dispute resolution'.<sup>413</sup> It follows that the enforcement courts should avoid an unduly narrow approach to the public policy exception which would render that exception 'pragmatically useless if not altogether non-existent'.<sup>414</sup> To do so would deter, rather than encourage, the use of international commercial arbitration.<sup>415</sup>

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<sup>411</sup> Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 179-180 and 202-204; Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 259, 273.

<sup>412</sup> As discussed in Chapter 3 section 3.6.5(b), arbitrators have no 'forum' and are not guardians of any nation's laws or public policies. However, they are obliged to use reasonable endeavours to ensure that their awards are enforceable.

<sup>413</sup> Michael Hwang and Amy Lai, 'Do Egregious Errors Amount to a Breach of Public Policy?' (2005) 71 *Arbitration* 1, 4.

<sup>414</sup> Joel Junker, 'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards' (1977) *California Western International Law Journal* 228, 245.

<sup>415</sup> *Ibid*, 247.

### 5.3 ARTICLE V OF THE NEW YORK CONVENTION

Throughout this thesis, the ‘public policy exception’ means New York Convention Art V(2)(b), and includes the mirroring provisions of Model Law Art 36(1)(b)(ii) and Australia’s IAA s 8(7)(b).<sup>416</sup> Other exceptions to enforcement are stipulated in New York Convention Art V, Model Law Art 36, IAA ss 8(5) and 8(7), conveniently referred to as ‘the non-enforcement provisions’ in this thesis. This section examines the main features of the non-enforcement provisions, while identifying any textual differences that may affect their interpretation in Australia.

#### 5.3.1 Article V(1) vs V(2): Parties’ challenge vs Judges’ own motion

Article V of the New York Convention comprises seven exceptions to enforcement and divides them into two groups. The first group (consisting of five exceptions) can be invoked only at the request of the relevant party and upon that party’s proof.<sup>417</sup> Article V(1) consists of the following grounds:

- (a) parties’ incapacity or invalid arbitration agreement;
- (b) lack of notice or fairness concerning the arbitral process;
- (c) arbitral award exceeding the scope of the parties’ submission to arbitration;
- (d) invalid composition of the arbitral tribunal; and
- (e) non-binding, annulled or suspended arbitral awards.

By contrast, the enforcement court can raise the second group (consisting of two exceptions), if it finds that the relevant grounds exist and justify refusal of enforcement.<sup>418</sup> Article V(2) concerns:

- (a) non-arbitrable subject matter under the law of the place of enforcement; and
- (b) contravention of the public policy of the place of enforcement.

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<sup>416</sup> Section 6 of the Introduction (Terminology – ‘The public policy exception’) outlines these provisions.

<sup>417</sup> New York Convention Art V(1)(a)-(e), Model Law Art 36(1)(a)(i)-(v) and IAA s 8(5)(a)-(f).

<sup>418</sup> New York Convention Art V(2)(a)-(b), Model Law, Art 36(1)(b)(i)-(ii) and IAA s 8(7)(a)-(b).

Accordingly, Art V(1) must be raised and proven by the parties, whereas Art V(2) (which contains the public policy exception) can be raised by the enforcement courts on their own motion (known as '*ex officio*'). This is mainly because Art V(1) intends to protect the interests of the arbitration parties, whereas Art V(2) acts as a 'safety net' which serves the 'vital interests' of the enforcement State.<sup>419</sup>

This leads to the perception that, while Art V(1) acknowledges party autonomy, the public policy exception in Art V(2) is nevertheless a significant limit on that autonomy.<sup>420</sup> However, the parties remain free to base their claims on Art V(2).<sup>421</sup> In fact they have routinely done so,<sup>422</sup> and may do so even more frequently if the public policy exception remains an unruly horse.

In most of the cases referred to in this thesis, the public policy exception was invoked by the relevant parties. The enforcement courts seldom act *ex officio* in examining public policy, presumably in deference to the pro-enforcement policy of the New York Convention. Chapter 6 examines the circumstances in which Australian courts need not and should not refrain from invoking the public policy exception.<sup>423</sup> Such reluctance or restraint appears natural given the tradition that Australia's common law system is adversarial rather than inquisitorial.<sup>424</sup> However, some Australian judges embrace the view that public policy is the 'backbone' of Australian law – it provides the Australian

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<sup>419</sup> Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 133-134 and 196; United Nations Conference on Trade & Development, *Dispute Settlement: International Commercial Arbitration* (Module 5.7 Recognition & Enforcement of Arbitral Awards: The New York Convention), UN Doc UNCTAD/EDM/Misc.232/Add.37 (2003) 29.

<sup>420</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 731 para 26-144.

<sup>421</sup> Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 134.

<sup>422</sup> Christopher Kuner, 'The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention' (1990) 7 *Journal of International Arbitration* 71, 73.

<sup>423</sup> See Chapter 6 section 6.6.1 – '*Ex officio* consideration of public policy'.

<sup>424</sup> In an adversarial system, the judges have a passive role as the parties have the primary responsibility for defining the issues, and for investigating and advancing their case. By contrast, in an inquisitorial system, the judges assume an active role in the taking of evidence, sometimes specifying the facts upon which evidence is required, and directing the parties to produce specific proof. The judges are involved in the search for truth. See Gabrielle Kaufmann-Kohler, 'Globalisation of Arbitral Procedure' (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, 1331; Natalie Cuff, 'Is the Adversarial System of Justice the Best?' (2004) *The Verdict* 19.

common law with strength and mobility.<sup>425</sup> Furthermore, the *ex officio* application of Art V(2) recognises the importance of the public policy exception in counterbalancing the pro-enforcement policy of the New York Convention. It also reinforces that party autonomy is not unlimited.

### 5.3.2 Discretionary nature of Article V

The discretionary nature of Art V implements and complements the New York Convention's pro-enforcement policy.<sup>426</sup> Unlike the use of the word 'shall' in Art III, the word 'may' in Art V indicates that Art V is discretionary or permissive, rather than mandatory or obligatory. It follows that the enforcement courts retain a 'residual discretion' to enforce awards notwithstanding the parties' establishment, or the courts' finding, of an exception to enforcement.<sup>427</sup>

For instance, at stage three in the application of the public policy exception,<sup>428</sup> the enforcement court may enforce an award even if such enforcement may contravene the enforcement State's public policy. As Chapter 6 will explore, the court may do so if it considers that the relevant party has waived, forfeited, or is otherwise estopped from raising the public policy exception.<sup>429</sup> The discretionary nature of Art V enables the enforcement court to balance the arguments for and against enforcement, most of which represent the competing interests in arbitration.

This thesis is confined to the English version of the New York Convention. It does not explore the wording differences in other language versions. For instance, the French version seemingly suggests that Art V is not discretionary.<sup>430</sup>

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<sup>425</sup> See, eg, Justice GN Williams, 'Importance of Public Policy Considerations in Judicial Decision-Making' (2000) *International Legal Practitioner* 134, 135 and 139.

<sup>426</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1683-1684.

<sup>427</sup> See, eg, Mason NPJ in *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003.

The same interpretation also applies to the public policy exception in Model Law Art 36(1)(b): see *Schreter v Gasma Inc* (1992) 7 O.R. (3d) 608.

<sup>428</sup> For the three stages in the application of the public policy exception, see Chapter 1 section 1.3.1.

<sup>429</sup> See Chapter 6 section 6.5.3 – 'Enforcement notwithstanding violations of due process and/or public policy'.

<sup>430</sup> See United Nations Conference on Trade & Development, *Dispute Settlement: International Commercial Arbitration* (Module 5.7 Recognition & Enforcement of Arbitral Awards: The New York Convention), UN Doc UNCTAD/EDM/Misc.232/Add.37 (2003) 29: "The wording 'may be refused'

### 5.3.3 Exhaustive nature of Article V

By qualifying the word ‘may’ with the word ‘only’, the exceptions to enforcement are intended to be exhaustive or exclusive.<sup>431</sup> This means that the enforcement court cannot refuse enforcement on grounds other than those enumerated in Art V. This is another pro-enforcement feature of the New York Convention, albeit somewhat controversial.

One of the perceived ‘incorrect applications of Art V’<sup>432</sup> is that some courts do not apply the New York Convention to the exclusion of their own laws. Alternatively or additionally, some courts may read other exceptions to enforcement into Art V by implication.<sup>433</sup> Both situations challenge the exhaustive nature of Art V and therefore warrant separate discussions.

#### (a) *Resort Condominiums case: Residual discretion to refuse enforcement?*

The heavily criticised Queensland Supreme Court decision in *Resort Condominiums International Inc v Bolwell*<sup>434</sup> exemplifies an enforcement court’s reliance on its domestic law to depart from the New York Convention. In that case, Lee J refused to enforce an interim arbitral award under the IAA, because that award was not a ‘foreign award’ within the meaning of the IAA; and alternatively, because that award’s enforcement would be contrary to Queensland public policy. After referring to the IAA together with several UK and US cases, Lee J concluded that discretion exists to refuse

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suggests that the judges may use their discretion when ruling on the request for recognition and enforcement. Similarly, the Spanish text uses the express ‘*se podra denegar*’. However, the wording of the French text – ‘*seront refusees*’ – implies that the court has no discretion but ‘shall refuse’ the enforcement if any of the grounds invoked by a party is met. The differences in the wording of the various language versions could pose a threat to the uniform interpretation of the Convention on this matter.”

See also Jan Paulsson, Jan, ‘May or Must under the New York Convention: An Exercise in Syntax and Linguistics’ (1998) 14 *Arbitration International* 227; Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 301-304.

<sup>431</sup> See, eg, US cases such as *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us Inc*, 126 F 3d 15, 20 (2<sup>nd</sup> Cir, 1997); *International Standard Electric Corporation v Bidas Sociedad Anonima Petrolera*, 745 F Supp 172, 181 (SDNY 1990); *Brandeis Intsel Ltd v Calabrian Chemicals Corp*, 656 F Supp 160, 165 (SDNY 1987).

<sup>432</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 268.

<sup>433</sup> Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 135.

<sup>434</sup> *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406.

enforcement of an award ‘quite apart from the specific [exceptions to enforcement]’.<sup>435</sup> Lee J reasoned that, although IAA s 8(5) substantially mirrors New York Convention Art V(1), its omission of the word ‘only’ is significant as it implies a general or residual discretion to deny enforcement. This is an interesting (if not perplexing) textual difference between IAA s 8 and New York Convention Art V. Another difference is that New York Convention Art III uses the obligatory wording ‘shall recognize arbitral awards as binding and enforce them’, whereas IAA s 8(2) uses the permissive wording ‘a foreign award may be enforced’.

At first glance, these ‘slight wording differences’ suggest that Australian courts have a discretion to refuse enforcement beyond the grounds stipulated in IAA s 8(5) (which is the Australian version of New York Convention Art V(1)).<sup>436</sup> However, upon closer examination, it is more likely that these wording differences merely emphasise ‘judicial discretion over the enforcement of a foreign arbitral award in Australia’:

“the intentions of the Federal legislature would have been to faithfully enact the purpose of the New York Convention in the IAA. Such substantive changes would not have been anticipated and the Convention should have been considered in the interpretation of section 8(5). The grounds for refusing an award outlined in Article V are considered exhaustive and case law from various jurisdictions aids in this conclusion.”<sup>437</sup>

Implicit in the above message are two criticisms of the *Resort Condominiums case*.

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<sup>435</sup> Ibid, 426-427.

<sup>436</sup> Doug Jones, ‘Enforcement of Foreign Arbitral Awards and Judicial Intervention in Australia’ (Paper presented at the Inaugural Arbitration Conference, 1 March 2003) 4.

The IAA has been criticised as ‘an Australian implementing Act which is deficient in this respect’: see Albert Jan van den Berg, ‘Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few’ (1999) *ICC International Court of Arbitration Bulletin*, ‘Arbitration in the Next Decade’ Special Supplement 75, 76.

<sup>437</sup> Doug Jones, ‘Enforcement of Foreign Arbitral Awards and Judicial Intervention in Australia’ (Paper presented at the Inaugural Arbitration Conference, 1 March 2003) 5 and 4.

See also Neil Kaplan, ‘A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting With Domestic Disputes. Is There a Worldwide Trend Towards Supporting An International Arbitration Culture?’ in Albert Jan van den Berg (ed), *International Dispute Resolution: Towards an International Arbitration Culture* (1998) 187, 208: “Despite the omission of the word ‘only’ it cannot have been the intention of the Australian Legislature to implement the New York Convention and at the same time alter its whole terms and substance. It could not have been their intent to implement the Convention and at the same time leave enforcement to the whims of individual judges by permitting them to go outside the exhaustive grounds set out in Art V.”

Firstly, the court should construe the IAA on the presumption that the Federal legislature intended to faithfully implement the New York Convention and therefore any changes to the provisions of the Convention should require ‘clear words and strong indicia’.<sup>438</sup> According to the Australian High Court:

“It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity.”<sup>439</sup>

The ‘supremacy accorded to Australian domestic legislation in the event of a conflict with the rules of international law’ is based on the Australian legislature’s ability to legislate inconsistently with the rules of international law.<sup>440</sup> However, this is subject to the principle of statutory construction, which is known as ‘the rebuttable presumption that legislation does not intend to derogate from international law’.<sup>441</sup>

The legislative implementation of the New York Convention in Australia is somewhat unusual. Instead of giving the New York Convention the force of law in Australia, IAA s 4 merely approves Australia’s accession to the New York Convention.<sup>442</sup> Instead of enacting the New York Convention’s provisions as part of the Australian domestic law, IAA Schedule 1 merely sets out the English text of the New York Convention.<sup>443</sup>

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<sup>438</sup> Michael Pryles, ‘Interlocutory Orders and Convention Awards: The Case of Resort Condominiums v Bolwell’ (1994) 10 *Arbitration International* 385,393-394.

<sup>439</sup> *Polites v Commonwealth* (1945) 70 CLR 60, 69 (Latham CJ).

See also Chief Justice Murray Gleeson, ‘Global Influences on the Australian Judiciary’ (2002) 22 *Australian Bar Review* 184, 187: “In resolving ambiguity in a statute, courts favour a construction which accords with Australia’s obligations under a treaty on the basis that they presume that the parliament intends to legislate in accordance with, rather than contrary to, its international obligations.”

<sup>440</sup> Geoffrey Lindell, ‘Judicial Review of International Affairs’ in Brian Opeskin and Ronald Rothwell (eds), *International Law and Australian Federalism* (1997) 160, 174 cites *Horta v Commonwealth* (1994) 181 CLR 183, 195-196.

<sup>441</sup> Sir Anthony Mason, ‘International Law as a Source of Domestic Law’ in Brian Opeskin and Ronald Rothwell (eds), *International Law and Australian Federalism* (1997) 210, 220 cites *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; Shearer in Opeskin & Rothwell 54 cites *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 14 CLR 1, 38.

<sup>442</sup> By contrast, IAA s 16(1) expressly states that the Model Law ‘has the force of law in Australia’.

<sup>443</sup> See the definition of the New York Convention in IAA s 3. See also J Goldring, ‘Australia and Commercial Arbitration’ (Paper presented at the Sixth International Trade Law Seminar, Canberra, 21-22 April 1979) 119, 145.

Purporting to ‘implement’ the New York Convention,<sup>444</sup> provisions such as IAA s 8 substantially (but not identically) reproduce the relevant New York Convention provisions. It follows that any textual differences between the IAA and the New York Convention are likely to be intentional. Thus it has been suggested that the IAA would prevail over the New York Convention in the event of inconsistency.<sup>445</sup>

The second criticism of the *Resort Condominiums case* stems from the generally accepted view that the New York Convention’s exceptions to enforcement are exhaustive.<sup>446</sup> Consequently, several distinguished scholars have predicted that the *Resort Condominiums case* ‘will meet with near universal disapproval’, because it is ‘at variance with the scheme, purpose and philosophy of the [New York] Convention’, and would therefore frustrate the pro-enforcement policy in delimiting the grounds for non-enforcement.<sup>447</sup>

Furthermore, the *Resort Condominiums case* also departs from the narrow approach to the public policy exception. For Lee J, several orders in the award are contrary to Queensland public policy ‘not only in the sense that many of them as drafted would not be made in Queensland.., but also because of possible double vexation and practical

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<sup>444</sup> J Goldring, ‘Australia and Commercial Arbitration’ (Paper presented at the Sixth International Trade Law Seminar, Canberra, 21-22 April 1979) 119, 121.

<sup>445</sup> See Duncan Miller, ‘Public Policy in International Commercial Arbitrations In Australia’ (1993) 9 *Arbitration International* 167, 193.

<sup>446</sup> According to Okezie Chukwumerije, ‘Enforcement of Foreign Awards in Australia: The Implications of Resort Condominiums’ (1994) 5 *Australian Dispute Resolution Journal* 237, 244-245, the cases cited in the *Resort Condominiums case* do not support the existence of the residual discretion in the enforcement of awards under the New York Convention. Most of these cases deal with the courts’ general discretion to deny enforcement of domestic awards and do not refer to the New York Convention. Nor do they expressly indicate that the exceptions to enforcement are not limited to Art V.

<sup>447</sup> See, eg, Michael Pryles, ‘Interlocutory Orders and Convention Awards: The Case of Resort Condominiums v Bolwell’ (1994) 10 *Arbitration International* 385, 393; Michael Pryles, Jeff Waincymer and Martin Davies, *International Trade Law: Commentary and Materials* (2<sup>nd</sup> ed, 2004) 669 para 12,100; Michael Hwang and Andrew Chan, ‘Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries’ in Albert van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (2001) 145, 152; Neil Kaplan, ‘A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting With Domestic Disputes. Is There a Worldwide Trend Towards Supporting An International Arbitration Culture?’ in Albert Jan van den Berg (ed), *International Dispute Resolution: Towards an International Arbitration Culture* (1998) 187, 207; Australian Law Reform Commission, *Legal Risks in International Transactions*, Report No 80 (1996) 80 paras 11.70-11.71.



difficulties in interpretation and enforcement’.<sup>448</sup> According to an Australian commentator:

“The interpretation of the public policy exception appears to strain the interpretation of Article V(2)(b) of the New York Convention. Further, this interpretation is at odds with decisions made in other jurisdictions where the inclination is to narrowly interpret Article V(2)(b) to enable the full recognition and enforcement of foreign arbitral awards without judicial interference or frustration from the courts of contracting states. The *Resort Condominiums* decision raises questions for an arbitrator; when handing down an award is there the potential for the award to be refused enforcement based on national laws or practical difficulties in enforcement?”<sup>449</sup>

The Australian position remains unsettled until a higher court comments on the correctness of the *Resort Condominiums case*.<sup>450</sup> Nevertheless, it should be pointed out that the word ‘only’ is present in Art V(1) but not in Art V(2) of the New York Convention, the latter of which includes the public policy exception. This is another difference between Arts V(1) and V(2), which is less noticeable but potentially debatable. It may either reopen the old debate, or generate a new debate, on whether the exhaustive nature of Art V is confined to the grounds in Art V(1). The absence of the word ‘only’ in Art V(2) at least supports the interpretation that the scope of the public policy exception is not exhaustive.

Lee J’s conclusion against enforcement in the *Resort Condominiums case* was based on the public policy exception in IAA s 8(7)(b), which mirrors New York Convention Art V(2)(b). Whether or not Lee J reached this conclusion too readily, the lack of any guidance in the New York Convention on the interpretation of the public policy exception allows the enforcement court to add or widen the exceptions to enforcement under the guise of public policy. Public policy, by its nature, is relative, evolutive and therefore non-exhaustive.

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<sup>448</sup> *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, 431.

<sup>449</sup> Doug Jones, ‘Enforcement of Foreign Arbitral Awards and Judicial Intervention in Australia’ (Paper presented at the Inaugural Arbitration Conference, 1 March 2003) 7. See also Australian Law Reform Commission, *Legal Risks in International Transactions*, Report No 80 (1996) paras 11.70-11.71

<sup>450</sup> Doug Jones, ‘Enforcement of Foreign Arbitral Awards and Judicial Intervention in Australia’ (Paper presented at the Inaugural Arbitration Conference, 1 March 2003) 11

At this stage, the suggestion remains that Australian courts should adopt the same approach to the public policy exceptions in each of the IAA, New York Convention, and Model Law. The omission of the word ‘only’ does not necessarily mean that the exceptions to enforcement are non-exhaustive. Nor does it necessarily mean that Australian courts can adopt a wider interpretation of the public policy exception in the IAA. However, such an omission seems to suggest that Australian courts may take a more proactive and vigorous approach, meaning that Australian courts may invoke public policy more readily in appropriate circumstances, and may refuse more readily the enforcement of arbitral awards which fall within the public policy exception.<sup>451</sup>

**(b) Additional exceptions to enforcement by implication?**

The preceding section has identified the potential for implying additional exceptions to enforcement under the guise of the public policy exception. It is widely accepted that the exhaustive nature of Art V means that an arbitrator’s substantive errors such as non-application or misapplication of law, inadequate or incorrect reasoning, cannot be a legal basis for refusing enforcement under the New York Convention.<sup>452</sup> However, some courts have questioned, and even departed from this view, particularly the courts of the countries in which an arbitrator’s manifest disregard or error of law is a ground for setting aside arbitral awards.<sup>453</sup> Consequently, some courts have also challenged the exhaustive nature of Art 34 of the Model Law, stating that an arbitrator’s manifest disregard or error of law may fall within the public policy ground for annulment in Art 34(2)(b)(ii).<sup>454</sup>

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<sup>451</sup> See further discussions in Chapter 6 section 6.6 – ‘Other issues in applying the public policy exception’.

<sup>452</sup> See, eg, *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us Inc*, 126 F 3d 15 (2<sup>nd</sup> Cir, 1997); *M & C Corporation v Erwin Behr GmbH & Co*, 87 F 3d 884 (6<sup>th</sup> Cir, 1996); *Brandeis Intsel Ltd v Calabrian Chemicals Corp*, 656 F Supp 160 (SDNY 1987), most of which are discussed in Chapter 7 section 7.2.2(a) – ‘Case study: Arbitrator’s disregard or error of law: The US approach’.

For other cases, see ILA Interim Report 240.

<sup>453</sup> See the cases cited in ILA Interim Report 240, including French Court of Appeal decision in *Andre v Multitrade* (1994) Rev. Arb. 83.

<sup>454</sup> See, eg, *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 (Supreme Court of India, 17 April 2003), as discussed in Chapter 7 section 7.2.2(b). See also *Zimbabwe Electricity Supply Authority v Maposa*, High Court of Zimbabwe, 27 March and 9 December 1998 (CLOUT Case No. 267); and Supreme Court of Zimbabwe, 21 October and 21 December 1999 (CLOUT Case No. 323), as discussed in Chapter 7 section 7.2.2(c).

Section 5.4.3 of this Chapter explores the distinction and interaction between non-enforcement and annulment of arbitral awards. Section 7.2 of Chapter 7 further examines the effect of the arbitrator's manifest disregard or error of law on the judicial application of the public policy exception in both enforcement and annulment proceedings. At this stage, it would seem that any implication of additional exceptions to enforcement should be done only for the purposes of preventing or sanctioning injustice.<sup>455</sup>

## 5.4 THE PUBLIC POLICY EXCEPTION & OTHER EXCEPTIONS TO ENFORCEMENT

An examination of the public policy exception vis-à-vis other exceptions to enforcement is necessary. This is because another perceived incorrect application of Art V is that the courts 'do not expressly mention [on] which ground... they rely, but refer to the Convention in a general way'.<sup>456</sup> Owing to its flexible and open-ended nature, the public policy exception overlaps and interacts with other exceptions to enforcement.

### 5.4.1 Article V(2)(b) & (2)(a): Public policy & Arbitrability

Article V(2) is commonly known as the 'public policy defence' with two limbs – lack of arbitrability in Art V(2)(a) and contravention of public policy in Art V(2)(b).<sup>457</sup> Interestingly, while the ILA has acknowledged that arbitrability may be part of public

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<sup>455</sup> For instance, in *Monesgasque de Reassurances SAM v State of Ukraine*, 311 F 3d 488 (2<sup>nd</sup> Cir, 2002), the US Court of Appeals held that, 'for reasons of convenience, judicial comity and justice', the New York Convention does not preclude application of the doctrine of *forum non conveniens*. It confirmed that the doctrine of *forum non conveniens* is part of procedural law which can apply to Convention awards. The Court relied on Art III of the New York Convention, which allows the application of 'the rules of procedure where the award is relied upon'. It also stated that the exceptions in Art V 'pertain to substantive matters rather than to procedure'. In rejecting the argument that Art V 'sets forth the only grounds for refusing to enforce a foreign arbitral award', the Court stated that Convention countries are 'free to apply differing procedural rules consistent with the requirement that the rules in Convention cases not be more burdensome than those in domestic cases'.

This US decision illustrates a recent development (at least in the United States), which casts doubt upon the exhaustive nature of Article V by endorsing non-enforcement on jurisdiction-related or procedural grounds such as *forum non conveniens* and lack of personal jurisdiction. For other US cases, see Harry Arkin and Jonathan Frank, 'Emasculation of Enforcement under the New York Convention in the USA?' (2005) 71 *Arbitration* 25.

<sup>456</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 268.

<sup>457</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) para 26-111.

policy, the ILA Resolution excludes this issue because of the separate provisions concerning arbitrability in Art V(2)(a) and Model Law Art 36(1)(b)(i).<sup>458</sup>

Issues concerning arbitrability, such as whether the arbitrability provisions in the New York Convention are superfluous, are beyond the scope of this thesis.<sup>459</sup> However, a thorough examination of the public policy exception warrants the following brief discussions on the interaction between public policy and arbitrability.

**(a) *Enforcement State's laws & public policies***

The arbitrability exception of Art V(2)(a) refers to the 'law' of the enforcement State whereas the public policy exception of Art V(2)(b) concerns the 'public policy' of the enforcement State. As discussed in Chapter 4, the concept of 'mandatory rules of public policy' recognises the overlap between laws and public policies. Both Arts V(2)(a) and (2)(b) may apply if a mandatory rule of a public policy nature pertaining to the enforcement State would regard the arbitral dispute as non-arbitrable (or inarbitrable), as well as render the arbitral award concerning that dispute unenforceable.<sup>460</sup> It is in this sense that arbitrability is viewed as part of public policy – they are the '*lex fori* grounds for refusing enforcement'.<sup>461</sup> Anti-trust and consumer protection are examples of 'public policy that controls the arbitrability of the subject matter of the dispute'.<sup>462</sup>

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<sup>458</sup> ILA Final Report 255.

<sup>459</sup> See the debate in Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 360 and 368; Lawrence Schaner and Amy Minardo, 'The Recognition and Enforcement of Foreign Arbitral Awards in the United States: The Pro-enforcement Bias Continues' (2003) 12 *International Legal Strategy* 1, 6; Karl-Heinz Bockstiegel, 'Public Policy and Arbitrability' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 177, 178ff; Homayoon Arfazadeh, 'Arbitrability under the New York Convention: The *Lex Fori* Revisited' (2001) 17(1) *Arbitration International* 73.

<sup>460</sup> Hong-Lin Yu and Eric Sauzier, 'From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration' (2000) 3 *International Arbitration Law Review* 114.

<sup>461</sup> Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 423.

<sup>462</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 369; William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 *Berkeley Journal of International Law* 173, 191.

**(b) *Enforceability of arbitration agreements & arbitral awards***

In spite of their overlap, the arbitrability exception of Art V(2)(a) concerns the legality of the arbitration agreement and the subject matter of the arbitral dispute, whereas the public policy exception of Art V(2)(b) concerns the subsequent arbitral proceedings and award.<sup>463</sup> If the subject matter of the dispute is incapable of settlement by arbitration under the laws of a Convention country, then pursuant to Art V(2)(a), the court of that country may refuse to enforce the arbitration agreement and deny the arbitrator's jurisdiction to resolve the dispute. If the party fails to challenge the arbitrator's jurisdiction or does so unsuccessfully, the subsequent enforcement of the award remains challengeable under Art V(2)(b), depending on whether the enforcement of that award would be contrary to the enforcement State's public policy.

Here it should be pointed out that lack of arbitrability (or 'non-arbitrability') is an exception to the enforcement of both arbitral awards under Art V(2)(a) and arbitration agreements under Art II.<sup>464</sup> However, there is no equivalent or comparable public policy exception to the enforcement of arbitration agreements.

**(c) *Narrow approach to both limbs in Art V(2)***

Another similarity between the arbitrability exception and the public policy exception in Art V(2) is that some national courts interpret both limbs narrowly in accordance with the New York Convention's pro-enforcement policy.<sup>465</sup> The courts have also applied the distinction between domestic and international public policies to both exceptions.<sup>466</sup>

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<sup>463</sup> Jay Sever, 'The Relaxation of Inarbitrability and Public Policy Checks on US and Foreign arbitration: Arbitration Out of Control?' (1991) 65 *Tulane Law Review* 1661, 1663; Homayoon Arfazadeh, 'In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception' (2002) 13 *American Review of International Arbitration* 43, 56.

<sup>464</sup> New York Convention Art II(1) requires recognition of arbitration agreements whose subject matters are arbitrable. This is subject to the exception in Art II(3) about arbitration agreements which are 'null and void, inoperative or incapable of being performed'.

<sup>465</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) para 26-113.

See, eg, *Saudi Iron & Steel Co v Stemcor USA Inc*, District Court of New York (1997), extract in Yearbook Commercial Arbitration (US No. 264, para 5) <<http://www.kluwerarbitration.com>> at 26 July 2004: "Like the public policy exception, the incapable of settlement exception has been narrowly construed in light of the strong judicial interest in encouraging the use of arbitration."

<sup>466</sup> Albert Jan van den Berg, 'Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few' (1999) *ICC International Court of Arbitration Bulletin*, 'Arbitration in the Next Decade' Special Supplement 75, 86.

Consequently, the expansion of the concept of arbitrability together with the restriction on the meaning of public policy make it difficult to invoke both exceptions in Art V(2).<sup>467</sup>

Australian courts vary on the scale of pro-arbitration approach to the issue of arbitrability.<sup>468</sup> For instance, claims under the *Trade Practices Act 1974* (Cth) and the *Corporations Act 2001* (Cth) are now arbitrable.<sup>469</sup> However, it is interesting to note that in *ACD Tridon Inc v Tridon Australia Pty Ltd*,<sup>470</sup> Austin J cautioned against the US courts' liberal construction of arbitration clauses based on the 'presumption in favour of arbitrability'.<sup>471</sup> This is despite Austin J's acknowledgement that 'while Australian courts are not constrained by considerations of public policy to adopt a liberal construction of arbitration clauses, reflection on the likely intention of the parties will steer them away from any narrow construction'.<sup>472</sup> Thus it is possible that some Australian courts may prefer a less pro-enforcement approach to the arbitrability exception and even the public policy exception.

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<sup>467</sup> For instance, anti-trust and anti-competition claims are now arbitrable: see, eg, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985); *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816. Claims arising under securities law and employment discrimination statutes are also arbitrable in the United States: see, eg *Scherk v Alberto-Culver*, 417 US 506 (1974); *Circuit City Stores Inc v Adams*, 532 US 105, 116-121 (2001).

<sup>468</sup> The New South Wales and Victorian courts are more pro-arbitration whereas the federal courts remain conservative, although the pro-arbitration attitude appears prevalent: see Romauld Andrew, 'The Ill-favoured Child of Litigation: International Commercial Arbitration and the Australian Trade Practices Act 1974' (2004) 21 *Journal of International Arbitration* 239. See also Max Bonnell, 'Arbitrability of Competition Disputes in Australian Law' (2005) 79 *Australian Law Journal* 585.

<sup>469</sup> See *Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc* [1997] FCA 575; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (especially paras 184 and 192).

<sup>470</sup> *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896.

<sup>471</sup> *Ibid*, para 123: "I am not aware of any Australian case that has in terms endorsed the idea that, in construing an international arbitration clause, the court should apply a presumption in favour of arbitration. The concept of 'presumption', typically used for presumptions of fact, seems to be out of place when the issue is to construe an instrument. There is, however, Australian authority that, on one view, could be treated as having a similar effect."

<sup>472</sup> *Ibid*, para 120.

#### 5.4.2 Article V(2)(b) & (1)(b): Public policy & Due process

Most of the prescribed exceptions to enforcement concern due process, such as ‘unfairness in the manner in which the arbitration was conducted or the legitimacy of the arbitration itself’.<sup>473</sup> As mentioned in Chapter 2, the public policy exception of Art V(2)(b) includes procedural public policies and therefore overlaps with the due process exception of Art V(1)(b).<sup>474</sup>

The due process exception of Art V(1)(b) specifically concerns the notification of the arbitrators’ appointment and the arbitral proceedings, as well as the ability to present one’s case. It is now settled that this specific (and narrower) provision does not have the effect of excluding procedural public policy from the general (and wider) provision of Art V(2)(b):

“It is commonly recognised that due process constitutes part of public policy. In this context the question arises whether the specific provision of Art V(1)(b) excludes the due process grounds from the general provision of Art V(2)(b). The importance of this question is obvious in light of the fact that the former ground may be considered by the court only if raised by the parties themselves, whereas the court takes account of the latter *ex officio*. Given the essential position of the due process requirement, it may be concluded that the special provision of Art V(1)(b) was inserted as a manifestation of its importance. Therefore, Art V(2)(b) should be interpreted as including the specific ground referred to in Art V(1)(b).”<sup>475</sup>

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<sup>473</sup> ‘The Public Policy Exception to the Recognition and Enforcement of Foreign Arbitral Awards’ (December 2004) Quinn Emanuel, 2; Glenn Hendrix, ‘International Judicial Assistance from American Courts in Russian Litigation and Arbitration Proceedings’ (Paper presented at the Russian-American Symposium on Private International Law, Moscow, 29 June 2004) 6; Randall Peerenboom, ‘The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the PRC’ (2000) 1 *Asian-Pacific Law & Policy Journal* 12:1, 12:25.

<sup>474</sup> See Chapter 2 section 2.3.3 – ‘Public policy & due process exceptions to enforcement’.

<sup>475</sup> United Nations Conference on Trade & Development, *Dispute Settlement: International Commercial Arbitration* (Module 5.7 Recognition & Enforcement of Arbitral Awards: The New York Convention), UN Doc UNCTAD/EDM/Misc.232/Add.37 (2003) 32.

See also ILA Final Report 256; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 711 para 26-92; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 299; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) 149.

Consequently, violation of due process under Art V(1)(b) may constitute violation of public policy under Art V(2)(b), both of which may render the offending award unenforceable. Another consequence is that it has become ‘fashionable’ for parties to raise both exceptions, even though the enforcement court can consider the public policy exception *ex officio*.<sup>476</sup> The parties may raise due process violations under the public policy exception of Art V(2)(b), or they may raise the due process exception of Art V(1)(b) under the guise of public policy. They would bear the onus of proof in both situations.<sup>477</sup>

The inclusion of procedural public policy in Art V(2)(b) allows the enforcement court to adjudicate on the suspected due process violations in the arbitral process in appropriate circumstances, for instance, if the relevant party is unable to participate in the enforcement proceedings.<sup>478</sup> Nonetheless, the overlap between Arts V(1)(b) and V(2)(b) creates challenges for the application of the public policy exception. These include choice of law issues in applying the public policy exception of Art V(2)(b) together with the due process exception of Art V(1)(b), issues of waiver and discretionary enforcement – as Chapter 6 will explore.<sup>479</sup>

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<sup>476</sup> According to Mason NPJ in *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003: “It has become fashionable to raise the specific grounds in...(Art V(1)(b)), which are directed to procedural irregularities, as public policy grounds (Art V(2)(b)). There is no reason that this course cannot be followed.”

<sup>477</sup> *Minmetals Germany GMBH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315; *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Mason NPJ).

<sup>478</sup> See further discussions in Chapter 6 section 6.5 – ‘Case study 2: Due process’.

<sup>479</sup> Chapter 6 section 6.5 examines the choice of law issue (ie whose laws or public policies can the enforcement court consider); the waiver issue (ie does waiver of due process violation also amount to waiver of public policy violation and therefore preclude both exceptions to enforcement); and the issue of discretionary enforcement (ie in what circumstances would it be appropriate for the enforcement court to allow enforcement notwithstanding the establishment of the due process exception or the public policy exception).



### 5.4.3 Article V(2)(b) & (1)(e): Non-enforcement & Annulment of arbitral awards

Violation of public policy is a ground for both non-enforcement and annulment of arbitral awards. The European Court of Justice in the *Eco Swiss case* stated that contravention of European public policy would justify annulment under the national laws of the EU member States, and possibly even non-enforcement under the New York Convention.<sup>480</sup>

Both annulment and enforcement proceedings can affect the enforceability of arbitral awards, although they usually occur in different places. The forum for enforcement proceedings is the ‘enforcement State’ (ie the place where the award is sought to be enforced), whereas the forum for annulment proceedings is the ‘supervisory State’ (ie the place in which, or under the law of which, the award is made).<sup>481</sup> The ‘enforcement court’ hears the enforcement proceedings whereas the ‘supervisory court’ hears the annulment proceedings.

Enforcement of arbitral awards is primarily governed by the New York Convention, whereas annulment of arbitral awards is governed by the domestic laws of each country.<sup>482</sup> However, in the interests of consistency and harmony, Model Law Article 34 stipulates various grounds for annulment which substantially correspond to the grounds for non-enforcement, including the public policy exception.<sup>483</sup>

While there are no comparable annulment provisions in the New York Convention, annulment is nevertheless a ground for non-enforcement under Art V(1)(e). Conveniently referred to as ‘the annulment exception’ in this thesis, Art V(1)(e) requires proof that the award ‘has been set aside... by a competent authority of the country in which, or under the law of which, that award was made’. The wording in Model Law Art 36(1)(a)(v) and IAA s 8(5)(f) is virtually identical.

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<sup>480</sup> *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, as discussed in Chapter 3 section 3.5.1.

<sup>481</sup> See the relevant definitions in section 3(b) of the Introduction (Terminology – ‘Enforcement vs Supervisory State, court & jurisdiction’).

<sup>482</sup> See New York Convention Art V(1)(e); Carolyn Lamm and Eckhard Hellbeck, ‘The Enforcement of Foreign Arbitral Awards Under the New York Convention: Recent Developments’ (2002) 5 *International Arbitration Law Review* 137, 141.

<sup>483</sup> The structure of Model Law Art 34 is almost identical with that of Art 36 and New York Convention Art V. The grounds in Art 34(2)(a) require parties’ proof whereas the grounds in Art 34(2)(b) can be raised on the courts’ own motion. Art 34(2)(b)(ii) is the public policy ground for annulment.

(a) *Article V(1)(e): Annulment as an exception to enforcement*

The annulment exception of Art V(1)(e) apparently gives annulment ‘extra-territorial’, ‘cross-border’ or ‘*erga omnes*’ effect under the New York Convention.<sup>484</sup> It follows that the consequences of annulment may be more ‘catastrophic’<sup>485</sup> than the consequences of non-enforcement, because annulment may preclude or at least jeopardise the parties’ ability to seek enforcement elsewhere. Two contentious situations have arisen from the ‘longstanding and often heated debate over the enforcement of annulled awards’<sup>486</sup> – non-enforcement following annulment, and enforcement notwithstanding annulment.

‘Non-enforcement following annulment’ means the enforcement court’s refusal to enforce a ‘foreign annulled award’ (ie an award which has been annulled elsewhere) under Art V(1)(e). It is based on the view that nothing remains to be enforced after annulment.<sup>487</sup> It is also based on judicial comity and the public policy against re-litigation of the same disputes.<sup>488</sup>

On the other hand, ‘enforcement notwithstanding annulment’ is almost the reverse situation. It is based on the view that an award is ‘a-national’, ‘stateless’, ‘delocalised’ or ‘floating’ in the sense that it ‘can never be set aside once and for all’.<sup>489</sup> It supports, and finds support, in the pro-enforcement policy of the New York Convention. Here the

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<sup>484</sup> Explanatory Note on the Model Law (UN Doc. A/40/17) para 44; Gunther Horvath, ‘The Duty of the Tribunal to Render an Enforceable Award’ (2001) 18 *Journal of International Arbitration* 135, 137; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 391; Albert Jan van den Berg, ‘Annulment of Awards in International Arbitration’ in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994) 133, 137-139.

<sup>485</sup> Gunther Horvath, ‘The Duty of the Tribunal to Render an Enforceable Award’ (2001) 18 *Journal of International Arbitration* 135, 143 and 144.

<sup>486</sup> Dana Freyer, ‘United States Recognition and Enforcement of Annulled Foreign Arbitral Awards: The Aftermath of the Chromalloy Case’ (2000) 17 *Journal of International Arbitration* 1.

<sup>487</sup> See, eg, Karl-Heins Bockstiegel, ‘Summary of Discussion in the Third Working Group’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 433, 438; Albert Jan van den Berg, ‘Enforcement of Annulled Awards?’ (1998) 9 *ICC International Court of Arbitration Bulletin* 15, 16.

<sup>488</sup> Andrew Rogers, ‘Enforcement of Awards Nullified in the Country of Origin’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 548, 548.

<sup>489</sup> Emmanuel Gaillard, ‘Enforcement of Awards Set Aside in the Country of Origin: The French Experience’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 505, 523; David Rivkin, ‘The Enforcement of Awards Nullified in the Country of Origin: The American Experience’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 528, 540-541.

discretionary nature of Art V has been identified as a ‘possible weakness’, since the enforcement court can still enforce a foreign annulled award despite the annulment exception of Art V(1)(e).<sup>490</sup> In this sense, ‘it is not yet clear whether the discretion to enforce can be applied to all grounds for refusal of enforcement listed in Art V’.<sup>491</sup>

Before exploring these contentions in Chapter 7,<sup>492</sup> it is appropriate to outline another source of controversy – namely, Art VII of the New York Convention.

**(b) Article VII(1): Enforcement under the more pro-enforcement law**

Article VII(1) is another pro-enforcement feature of the New York Convention as it allows, if not requires, the enforcement of arbitral awards notwithstanding Art V(1)(e). It states that the New York Convention ‘shall not...deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon’.

Known as the ‘the more favourable provision’, Art VII(1) empowers the enforcement court to apply its domestic law if that law is even more enforcement friendly than the New York Convention. Hence the enforcement court may enforce a foreign annulled award under its domestic law, even though such an award would otherwise be denied enforcement under the annulment exception of Art V(1)(e).<sup>493</sup>

Accordingly, Chapter 7 will explore two challenges for Australian courts. First, should Australian courts adopt the same approach to the public policy exception in both enforcement and annulment proceedings? Second, in what circumstances should Australian courts enforce awards which have been annulled in other countries?

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<sup>490</sup> Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (2000) 223-224.

<sup>491</sup> Albert Jan van den Berg, ‘The Application of the New York Convention by the Courts’ (1999) 9 *ICC Congress Series* 25, 30-31.

<sup>492</sup> See Chapter 7 section 7.3.2 – ‘Debates within the never-ending debate’.

<sup>493</sup> See, eg, *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996) and *Hilmarton v Omnium de Traitement et de Valorisation*, Paris Court of Appeal, 19 December 1991, extract in *Yearbook Commercial Arbitration* (France No. 18) <<http://www.kluwerarbitration.com>> at 27 July 2004, and their commentary in Chapter 7 section 7.3.1 – ‘Judicial disagreement on the extra-territorial effect of annulment’.

Meanwhile, it will suffice to note that the enforcement court may refuse to enforce foreign annulled awards under both the annulment exception of Art V(1)(e) and the public policy exception of Art (2)(b), if the enforcement of such awards would be contrary to the enforcement State's public policy.

## 5.5 CONCLUSIONS

Article V of the New York Convention is the genesis of Model Law Art 36 and IAA s 8. Its discretionary and exhaustive nature implements, or at least represents, the pro-enforcement policy of the New York Convention. It allows the enforcement of arbitral awards even if one of its specified exceptions to enforcement is applicable, while disallowing non-enforcement beyond its scope. Consequently, the annulment of an arbitral award in one place does not necessarily preclude the enforcement of that award elsewhere. Furthermore, Art VII permits enforcement of awards under the more favourable treaty or domestic law. Together these features signal to the courts of the Convention countries that the exceptions to enforcement in Art V should be construed narrowly, and that enforcement should be refused cautiously and sparingly.

The public policy exception co-exists with, and even incorporates, some of the other exceptions to enforcement in Art V. Despite the apparent width of its scope and its 'residual nature',<sup>494</sup> in the sense that it can be invoked by the courts *ex officio*, the courts have rarely done so, and the parties have rarely succeeded in invoking it to resist enforcement.<sup>495</sup> Such judicial reluctance to use public policy to defeat arbitral awards stems from the judicial adherence to the pro-enforcement policy of the New York Convention.

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<sup>494</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 376 and 382.

<sup>495</sup> See the case illustrations in Chapter 6 sections 6.4 ('Case study 1: Illegality') and 6.5 ('Case study 2: Due process').

According to Albert Jan van den Berg, 'Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few' (1999) *ICC International Court of Arbitration Bulletin*, 'Arbitration in the Next Decade' Special Supplement 75, enforcement was refused in approximately 10% of the reported cases involving the New York Convention.

A potential debate in Australia is whether the omission of the word ‘only’ in IAA s 8(5) (which is the Australian equivalent of New York Convention Art V(1)) means that the grounds in IAA s 8(5) are non-exhaustive, and/or that the Australian courts have a discretion to refuse enforcement of foreign awards. The public policy exception is both exhaustive and non-exhaustive. It is exhaustive in the sense that, once its scope is defined, any alleged contraventions of public policy falling outside such defined scope cannot justify non-enforcement. It is non-exhaustive in the sense that public policy is relative, ‘nebulous and fluid’.<sup>496</sup> Hence the scope of the public policy exception cannot be exhaustively defined.

The absence of any guidance in the New York Convention on the interpretation and application of the public policy exception leaves the door open for the enforcement courts to introduce new exceptions to enforcement under the guise of public policy. Thus any expansion of the scope of the public policy exception should only be made in the interests of justice.

Judicial approach to the public policy exception has been likened to ‘the movement of a pendulum’.<sup>497</sup> It has swung from anti-arbitration interventionism to the current pro-arbitration and therefore narrow approach to the public policy exception.<sup>498</sup> However, if both the pro-enforcement policy and the public policy exception are based on public policy, then ‘[w]hich element of public policy should win out in those circumstances’?<sup>499</sup>

Despite the apparent public policy paradox of the New York Convention, the prevention and sanction of injustice are the overriding objectives of both the public policy exception and the pro-enforcement policy. The public policy exception refuses to enforce unjust awards while the pro-enforcement policy does not extend to the enforcement of unjust awards.

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<sup>496</sup> Andrew Okekeifere, ‘Public Policy and Arbitrability under the UNCITRAL Model Law’ (1999) 2 *International Arbitration Law Review* 70, 70.

<sup>497</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 368.

<sup>498</sup> See eg, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985) and *Parsons & Whittemore Overseas Co Inc v Societe Generale de l’Industrie du Papier*, 508 F 2d 969 (2<sup>nd</sup> Cir, 1974).

<sup>499</sup> Andrew Rogers, ‘Enforcement of Awards Nullified in the Country of Origin’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 548, 550.

Accordingly, the Australian judiciary may need to depart from the narrow approach to the public policy exception in certain circumstances, lest arbitral finality and party autonomy be upheld at the expense of justice, integrity, or faith in arbitration.

Subject to a satisfactory and workable delimitation of the scope of the public policy exception, Australian courts should invoke this exception more readily when the circumstances call for it, and they should refrain from using their discretion to enforce awards which fall within the public policy exception.

After examining the main features affecting the scope and interpretation of the public policy exception, the next two Chapters will uncover the lessons that Australian courts can learn from non-Australian courts' application of the public policy exception. Chapter 6 focuses on the judicial exercise of balancing the public policy exception with the pro-enforcement policy. Chapter 7 considers those annulment-related issues which complicate the application of the public policy exception.

“If international arbitration is to remain an activity in the pursuit of international justice, it will have to face many unforeseeable and novel challenges that can only be addressed through visionary ‘leaps in the dark’, and for which there would be no better companion than an ‘unruly horse’.”<sup>500</sup>

Perhaps the ‘unruly horse’ metaphor is not entirely pessimistic after all.

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<sup>500</sup> Homayoon Arfazadeh, 'In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception' (2002) 13 *American Review of International Arbitration* 43, 64.

## CHAPTER 6

### RIDING THE UNRULY HORSE – APPLYING THE PUBLIC POLICY EXCEPTION IN ENFORCEMENT PROCEEDINGS

#### 6.1 INTRODUCTION

If public policy remains an unruly horse, has it led the judges away from sound law? Should Australian courts embrace the narrow approach to the public policy exception, or should they swing the pendulum a little further away from the pro-enforcement policy? The pro-enforcement policy presumes arbitral awards to be enforceable as a general rule, while the narrow approach interprets the public policy exception strictly against non-enforcement.

This narrow approach to the public policy exception facilitates the enforceability of arbitral awards and arguably assists ‘Australia’s efforts to establish itself as a centre for international commercial arbitration’.<sup>501</sup> Yet Australian courts should remain vigilant against injustice in arbitration.

As emphasised throughout this thesis, the New York Convention’s public policy paradox (ie the public policy exception to the pro-enforcement public policy) has created the perception that the public policy exception and the pro-enforcement policy are competing public policies which protect competing interests. The courts of many countries have resolved this apparent conflict by deferring to the pro-enforcement policy, usually without exploring whether these public policies indeed conflict.

This Chapter examines the application of the narrow approach to the public policy exception, particularly by the courts in England, Hong Kong and the United States. It will recommend Australian courts to consider reorienting the current perception of the public policy paradox before adopting or formulating their approach to the public policy exception. By adjusting the current perception of conflict to that of compatibility, Australian courts may view the public policy exception as playing a neutral and facilitative role. Specifically, both the public policy exception and the pro-enforcement policy are interactive and interdependent public policies which are subject to the same overriding objectives of preventing and sanctioning injustice in arbitration. The

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<sup>501</sup> Justice Andrew Rogers, ‘The UNCITRAL Model Law: An Australian Perspective’ (1990) 6 *Arbitration International* 348, 351.

relationship between these two public policies may be described as ‘reciprocal and dynamic interaction’<sup>502</sup> or ‘unruly alliance’.<sup>503</sup> The challenge is to ‘integrate these eclectic, diverse and often conflicting interests...into one coherent conception of...justice’.<sup>504</sup>

This perception may, hopefully, inspire clarity and consistency in the application of the public policy exception. It may also prevent Australian courts from indiscriminately applying the narrow approach to the public policy exception at the expense of justice and faith in arbitration.

## 6.2 REVISITING THE STAGES OF APPLYING THE PUBLIC POLICY EXCEPTION

The courts seldom articulate their reasoning when applying the public policy exception. Hence the request in Recommendation 1(g) of the ILA Resolution:<sup>505</sup>

“If the court refuses recognition or enforcement of the arbitral award, it should not limit to a mere reference to Article V2(b) of the New York Convention 1958 or to its own statute or case law. Setting out in detail the method of its reasoning and the grounds for refusing recognition or enforcement will help to promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy.”

This thesis analyses the judicial application of the public policy exception in enforcement proceedings by reference to the author’s three distinctive stages.<sup>506</sup>

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<sup>502</sup> Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 202.

<sup>503</sup> Homayoon Arfazadeh, ‘In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception’ (2002) 13 *American Review of International Arbitration* 43, 45-46.

<sup>504</sup> *Ibid*, 64.

<sup>505</sup> ‘ILA Resolution’ means *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, adopted at the International Law Association’s 70<sup>th</sup> Conference held in New Delhi, India, 2-6 April 2002.

<sup>506</sup> Chapter 1 section 1.3.1 outlines these three stages in the application of the public policy exception.



**Stage one: Identifying an ‘applicable public policy’**

The primary question at stage one is whether the alleged public policy is an ‘applicable public policy’ – ie public policy that falls within the public policy exception. Discussions on the characterisation and categorisation of public policy demonstrate the need to re-express ‘international public policy’.<sup>507</sup> They lead to the recommendation that the applicable public policy should be confined to ‘mandatory rules of public policy’ – ie rules intended to encompass the relevant arbitral awards, proceedings or disputes, as expressed or embodied in the statutory and case law of the enforcement State, as well as in the international instruments and customs adopted or otherwise recognised by the enforcement State.<sup>508</sup>

**Stage two: Identifying violation of the applicable public policy**

Assuming that the alleged public policy falls within the public policy exception, the enforcement court would proceed to determine whether the enforcement of the award would be contrary to that public policy. The enforcement court may encounter the following questions:

- What, exactly, must be contrary to the applicable public policy? Does it include the award itself and even the underlying contract on which the award is based? For instance, is an award unenforceable under the public policy exception if it arises from, or is otherwise associated with, an illegal (and therefore unenforceable) contract?
- If the arbitrator has addressed the alleged public policy violation, should the enforcement court reopen or otherwise interfere with the arbitrator’s decision on this issue?

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<sup>507</sup> See Chapter 2 for the characterisation of public policy, and Chapter 3 for the categorisation of public policy.

<sup>508</sup> See Chapter 4 sections 4.3 (‘The mandatory rules of public policy exception’) and 4.4.2 (‘An alternative approach to defining the scope of the public policy exception’).

**Stage three: Exercising discretion to allow or refuse enforcement**

Assuming that enforcing the award would violate the applicable public policy, the enforcement court may proceed to the final stage of determining whether the award should nevertheless remain enforceable. The permissive language of the public policy exception gives the enforcement court the discretion to enforce an award wholly or partially.<sup>509</sup> The court may do so if it considers that the degree or the consequences of the public policy violation do not justify non-enforcement. The court may also allow enforcement if it considers that the relevant party has waived, forfeited, or is otherwise precluded from invoking the public policy exception.

In order to explore the second and third stages of applying the public policy exception, this Chapter focuses on two categories of cases. The first category concerns illegality as an example of substantive public policy while the second category concerns due process as an example of procedural public policy. They involve concepts of separability, waiver, estoppel and good faith, all of which exemplify the *lex mercatoria*.<sup>510</sup>

Before examining these cases, it is appropriate to consider the extent of judicial review in enforcement proceedings.

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<sup>509</sup> See Chapter 5 section 5.3.2 – ‘Discretionary nature of Art V’.

<sup>510</sup> See the list of examples of the *lex mercatoria* in Chapter 3 section 3.4.3(a) – ‘Application through the *lex mercatoria*’.

### 6.3 NO MERITS REVIEW?

In the context of arbitration, ‘merits review’ (or ‘*revision au fond*’) means reopening or retrying the merits of an award, such as examining the arbitrator’s interpretation and application of law.<sup>511</sup> The ‘no merits review’ principle is corollary to the principle of ‘judicial non-intervention’ or minimal judicial intervention in arbitration.<sup>512</sup> The enforcement court is expected to confine its review to the particular issues on which the award is challenged, rather than reviewing the award as a whole.<sup>513</sup> It follows that the enforcement court can examine only the dispositive aspect of an award,<sup>514</sup> without reviewing the reasoning in the award,<sup>515</sup> the evidence considered by the arbitrator, the underlying facts, or any new evidence presented during the enforcement proceedings.<sup>516</sup>

According to the ILA, the enforcement court ‘will not need to look further than the award itself’ when determining whether the enforcement of an award would contravene substantive public policy.<sup>517</sup> In comparison, the court ‘may need to carry out a wider enquiry’ in cases of procedural public policy.<sup>518</sup>

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<sup>511</sup> Stephen Hayford, ‘Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards’ (1996) 30 *Georgia Law Review* 731, 820.

<sup>512</sup> Paul Obo Idornigie, ‘Anchoring Commercial Arbitration on Fundamental Principles’ (2004) 23 *The Arbitrator & Mediator* 65, 75; Justice David Byrne, ‘The Evolution of Commercial Arbitration in Victoria’ (1995) 11 *The Arbitrator* 168, 174-175.

<sup>513</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 500; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 270.

<sup>514</sup> ILA Final Report 262.

<sup>515</sup> *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm).

<sup>516</sup> See eg, the Taiwanese decision of *North American Foreign Trading Corp v San Ai Electronic Industrial Corp Ltd*, 18 May 1984, Supreme Court, Tai Kang Zi Di 234 Hao Min Shi Cai Ding, which held that lack of reasons and inadequacy of compensation were irrelevant to ‘public order’, as both grounds of challenge involved the merits of the award. See further discussions in Chen-Huan Wu, *Recognition and Enforcement of Foreign Arbitral Awards in the Republic of China* (SJD Thesis, Bond University, 2003) 71.

<sup>517</sup> ILA Interim Report 244.

<sup>518</sup> ILA Interim Report 246.

See also Colman J in *Minmetals Germany GMBH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315, citing *Adams v Cape Industries* [1990] 2 QLR 657 to illustrate the principle that, ‘in the sphere of enforcement, considerations of public policy involve investigations not only of the core procedural defect relied upon by way of objection to enforcement but of all those other surrounding circumstances which are material to the English courts’ decision whether, as a matter of policy, enforcement should be refused’.

Although the public policy exception in New York Convention Art V(2)(b) does not expressly require the public policy contravention to be clear, manifest or obvious, the legislative history of Art V(2)(b) manifests an intention for 'superficial' judicial examination of awards and therefore 'relatively infrequent' non-enforcement of awards under this exception.<sup>519</sup> A 'full re-examination' dealing with the substance of awards is likely to defeat the purpose of the New York Convention, and is unlikely to comply with the 'time-limits required to make the Convention a practical expedient in international commercial life'.<sup>520</sup>

Thus it is commonly accepted that the drafters of the New York Convention intended to prohibit the enforcement courts from using Art V to conduct merits review.<sup>521</sup> Such an intention is evinced by the exhaustive nature of Art V,<sup>522</sup> as well as by the primary focus of Art V on procedural rather than substantive aspects.<sup>523</sup> More importantly, the public policy exception of Art V(2)(b) targets the enforcement of an award rather than the award itself. Thus it is 'not permissible for the court to enter into the arena for ascertaining whether the award is according to public policy'.<sup>524</sup>

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<sup>519</sup> ILA Final Report 253.

<sup>520</sup> *Note by the Secretary-General: Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UN ESC, UN Doc E/CONF.26/2 (6 March 1958) para 9.

<sup>521</sup> For instance, the Supreme Court of India has consistently said that none of the grounds in Art V enables a party to impeach or challenge an award on merits: see *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in *Yearbook Commercial Arbitration* XX (1995, India No. 22, para 10) <<http://www.kluwerarbitration.com>> at 26 July 2004; *Smita Conductors Ltd v Euro Alloys Ltd* (2001) 7 SCC 728 (Supreme Court of India, 31 August 2001), extract in *Yearbook Commercial Arbitration* (India No. 38, para 13), <<http://www.kluwerarbitration.com>> at 26 July 2004.

In the *Renusagar case* (at para 67), the Indian Supreme Court rejected the argument of unjust enrichment simply on the ground that the unjust enrichment must relate to the enforcement of the award, rather than the merits of the award (such as challenging the quantum of payment awarded by the arbitrator).

See also the US decision of *Indocomex Fibres Pty Ltd v Cotton Company International Inc*, 916 F Supp 721 (WD Tenn. 1996).

<sup>522</sup> Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (2002) 436.

<sup>523</sup> Philip McConaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration' (1999) 93 *Northwestern University Law Review* 453, 468; Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' [2002] 3 *Melbourne Journal of International Law* 400, 404.

<sup>524</sup> *General Electric Co v Renusagar Power Co Ltd*, High Court of Bombay, 21 October 1988, extract in *Yearbook Commercial Arbitration* XV (1990, India No. 18, para 38) <<http://www.kluwerarbitration.com>> at 27 July 2004.

In addition, the parties to arbitration can legitimately agree to exclude merits review, such as review of arbitrator's error of law. The New Zealand Court of Appeal has held that public policy 'is not automatically against' such exclusion or ouster of the court's jurisdiction.<sup>525</sup>

However, it is difficult to examine whether the enforcement of an award would be contrary to public policy without examining whether that award is itself contrary to public policy. Merits review seems unavoidable when illegality or other substantive public policies are involved.<sup>526</sup> For example, assume an award has been rendered pursuant to an allegedly illegal contract. If the arbitrator has decided or otherwise considered the illegality issue, then the enforcement court would need to examine the arbitrator's decision and reasoning in order to determine whether or not to reopen the arbitrator's decision on the illegality issue. If the award is silent on the illegality issue, then the court would need to examine the relevant contents of the allegedly illegal contract, which the award may or may not contain, in order to determine whether or not the contract is indeed illegal;<sup>527</sup> and if so, whether the award is tainted by such illegality so as to make its enforcement contrary to the enforcement State's public policy.

Fortunately, ILA Resolution Rec 3(c) provides for exceptions to the 'no merits review' principle:

“When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake reassessment of the facts.”

The ILA further explains that the enforcement court 'should be entitled to review the underlying evidence presented to the tribunal and in exceptional cases, any new evidence', provided that there is 'strong *prima facie* argument' of public policy violation.<sup>528</sup>

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<sup>525</sup> See *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669, 686 (Richardson J).

<sup>526</sup> A German court has said: “while it is usually not possible to review an arbitral award on the merits, it is possible to do so if the substantive *ordre public* is concerned.” See *Bitumat Ltd v Multicom Ltd*, Hanseatisches Oberlandesgericht Bremen, 30 September 1999 (CLOUT Case No. 371).

<sup>527</sup> In the context of the enforceability of illegal contracts, the Australian High Court has said that '[t]o inquire into the circumstances in which the illegality occurred is not at odds with the court's approach to public policy': see *Nelson v Nelson* (1995) 184 CLR 538; [1995] HCA 25, para 44 (Toohey J).

<sup>528</sup> ILA Final Report 262.

However, the ILA appears to confine merits review to alleged violations of ‘public policy rules’, which is one of its three categories of international public policy.<sup>529</sup> This seems problematic, particularly when the three categories of international public policy can overlap.<sup>530</sup> Differentiating treatment on the basis of different but overlapping categories of public policy may cause inconsistencies and confusions, making the application of the public policy exception even more unruly.

Furthermore, the ILA Resolution appears to send mixed messages about whether the public policy violation must be manifest, obvious or clear. Recommendation 1(b) uses the phrase ‘would be against international public policy’, whereas Rec 4 adds the word ‘manifest’ in the context of violation of international obligations (which is one of the three categories of international public policy). The ILA explains that it would not be appropriate to include ‘manifestly’ in Rec 1(b) because scrutiny of the facts of the case may be justified in some circumstances, citing Rec 3(c).<sup>531</sup> Recommendation 3(c) allows merits review if public policy rules are involved. Yet Rec 3(b)(ii) uses the word ‘manifestly’ in the context of disrupting the essential interests protected by the public policy rules. The ILA Final Report also states that ‘the public policy must usually be relatively obvious or clear’.<sup>532</sup> Are these inconsistencies intentional? In spite of this, the adoption of ILA Resolution Rec 3(c) in Australia is recommended.

Thus there appears to be another paradox in the New York Convention – the public policy exception to the ‘no merits’ principle.<sup>533</sup>

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<sup>529</sup> Chapter 3 section 3.2 outlines the ILA’s three categories of international public policy.

<sup>530</sup> ILA Resolution Rec 1(e) expressly recognises that ‘[s]ome rules, such as those prohibiting corruption, may fall into more than one category [of international public policy]’.

<sup>531</sup> See ILA Final Report 253.

<sup>532</sup> ILA Final Report 253.

<sup>533</sup> See Homayoon Arfazadeh, ‘In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception’ (2002) 13 *American Review of International Arbitration* 43, 44: “Both [the New York Convention and the Model Law] provide, in an apparent paradox, for the review on the merits of an award on the ground of incompatibility with the forum’s public policy... Well beyond the Convention’s scope of application, public policy has emerged as the customary ground for court scrutiny on the merits of an international award.”

See also Kenneth Ungar, ‘The Enforcement of Arbitral Awards under UNCITRAL’s Model Law on International Commercial Arbitration’ (1987) 25 *Columbia Journal of Transnational Law* 717, 750-751: “The substantive public policy factors to be considered by a court under [Model Law] Art 36(1)(b)(ii) come very close to ‘on the merits’ review of an arbitral award. Although national courts normally refrain from examining an arbitral decision on the merits, this provision allows the enforcing state to evaluate the fairness of the arbitral proceeding according to its own standard of justice.”

## 6.4 CASE STUDY 1: ILLEGALITY

According to Justice Kirby of the Australian High Court:

“Illegality, and the associated problems of statutory construction and public policy, have been described as ‘shadowy’ and ‘notoriously difficult’ area of the law where there are ‘many pitfalls’... Special concern has been expressed about the danger that illegality, in some way connected with a contract, will (unless tightly controlled) let loose the ‘unruly horse’ of public policy to a ‘blind gallop through the doctrinal forests of [the law].”<sup>534</sup>

Illegality and public policy are closely related.<sup>535</sup> This Chapter is confined to ‘initial illegality’ (ie illegality is present when the contract is made) and does not include ‘supervening illegality’. The ‘doctrine of illegality’, otherwise known as ‘illegality at common law’, derives from public policy considerations.<sup>536</sup> On the other hand, ‘statutory illegality’, or illegality under a statutory instrument, signifies the overlap between public policy and mandatory rules. For instance, to uphold a statutory prohibition is itself a public policy,<sup>537</sup> such as the ‘public policy to discourage breaking the law’.<sup>538</sup>

In the context of **enforceability of allegedly illegal contracts**, the Australian High Court maintains that questions of statutory interpretation and public policy are separate.

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<sup>534</sup> *Fitzgerald v Leonhardt Pty Ltd* [1997] HCA 17 (Kirby J).

<sup>535</sup> According to Donaldson MR’s frequently cited passage in *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Co and Shell International Co Ltd* [1987] 2 Lloyd’s Rep 246, 254: “It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good.”

Some statutes also expressly deem a contract to be illegal if it is ‘opposed to public policy’: see, eg, India’s Contract Act 1872 s 23 and its discussions in OP Malhotra, ‘The Scope of Public Policy under the Indian Arbitration and Conciliation Act 1996’ (2005) 71 *Arbitration* 36.

<sup>536</sup> *Nelson v Nelson* [1995] HCA 25, para 25 (McHugh J).

An example in the context of enforceability of contracts is that English courts have rejected the distinction ‘between performance being illegal and performance being contrary to public policy’, for these are ‘two strands of the same principle’: see *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd’s Rep 222, 225.

An example in the context of choice of foreign law to govern a contract is that a court would refuse to enforce the parties’ chosen law which is illegal or contrary to public policy of the forum: see *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277; *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378.

<sup>537</sup> *Fitzgerald v Leonhardt Pty Ltd* [1997] HCA 17 (Kirby J).

<sup>538</sup> *Nelson v Nelson* [1995] HCA 25, para 39 (Toohey J).

If the applicable statute renders the contract illegal and therefore void, then the second question of ‘unenforceability for public policy reasons’ does not arise.<sup>539</sup> If the statute does not render the contract void, then the court may still refuse to enforce the contract on the basis of public policy. The ‘court’s self-regard’ underlies such non-enforcement, as it should not ‘become involved in, and tainted by, the illegality’ through condoning the illegal conduct.<sup>540</sup> However, since public policy is ‘scarcely conducive to certainty and consistency’, the Australian High Court seems reluctant to use public policy to render contracts unenforceable.<sup>541</sup> This is because any judicial sanctions ‘would have to be proportionate to the seriousness of the illegality involved and not disproportionate to the seriousness of the breach’.<sup>542</sup> The court needs to consider the degree of the illegality, the deliberateness of the parties’ breach of law, and the parties’ state of mind in relation to the illegality.<sup>543</sup> Furthermore, the public policy in discouraging illegality and refusing enforcement of illegal contracts needs to be balanced with the policy of ‘preventing injustice and the enrichment of one party at the expense of the other’.<sup>544</sup>

In *Fitzgerald v Leonhardt*, the High Court upheld the enforceability of a contract to drill bores for ground water despite the statutory prohibition against such drilling without prior authorisation. Since the contract itself was not illegal, and since the performance of that contract was illegal only because of a mistaken failure to obtain authorisation, non-enforcement of the contractual right to payment ‘would be disproportionate to the seriousness of the unlawful conduct in question’.<sup>545</sup> However, Kirby J commented in obiter that there would be a strong case for non-enforcement on the basis of public policy, if the parties had either deliberately agreed to breach the legislation (such as deliberately refusing to obtain any authorisation), or performed the contract in a way clearly damaging to the scarce water resource.<sup>546</sup>

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<sup>539</sup> *Fitzgerald v Leonhardt Pty Ltd* [1997] HCA 17 (Kirby J).

<sup>540</sup> *Ibid.*

<sup>541</sup> *Ibid.*

<sup>542</sup> *Ibid.*, citing McHugh J in *Nelson v Nelson* (1995) 184 CLR 538, 612-613.

<sup>543</sup> *Ibid.*

<sup>544</sup> *Ibid.*

<sup>545</sup> *Ibid.*

<sup>546</sup> *Ibid.* For Kirby J, a court which grants relief in these circumstances would ‘affront the public conscience’ by ‘upholding a seriously anti-social act which was illegal or at least gravely reprehensible’.



The Australian High Court is yet to express its stance on the **enforceability of awards purporting to enforce allegedly illegal contracts**. At least lessons can be learnt from the English case of *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*.<sup>547</sup>

#### 6.4.1 *Westacre case*: Disagreement between English judges

In the *Westacre case*, the arbitrators rejected the defendant's claim that the contract for selling military equipment was procured by bribing government officials and was therefore illegal in the place of performance (Kuwait). Subsequently the supervisory court (the Swiss Federal Tribunal) refused to set aside the award, primarily because the defendant's arguments about contravening Kuwaiti law and public policy were founded on 'a rehearing of the facts on which the contested award is based'.<sup>548</sup> In order to resist enforcement of the award in England, the defendant again raised illegality: procurement of contract by corruption (which the arbitrators had rejected); or alternatively, personal influence. The defendant also sought to raise, for the first time, another public policy violation – namely, the award was obtained by fraud or manifestly dishonest evidence due to witnesses' perjury.

All judges rejected the personal influence claim because this did not fall within the public policy exception, especially when England was not the place of performance.<sup>549</sup>

The judges were also unanimous in refusing to admit the new evidence concerning perjury, without agreeing on the precise requirements for admitting such evidence.

The corruption claim divided the judges. It raised two questions – the preliminary question of whether the court should reopen the arbitrators' decision on corruption; and if so, the second question of whether the court should enforce the award.

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<sup>547</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740 (Colman J at first instance); [1999] 3 All ER 864 (English Court of Appeal) (the *Westacre case*).

<sup>548</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 751.

<sup>549</sup> *Ibid*, 775 (Colman J); *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 876 (Waller J).

(a) *The pro-enforcement majority vs The less pro-enforcement minority*

The majority (Mantell LJ and Sir David Hirst on appeal, Colman J at first instance) refused to reopen the arbitrators' decision for the following reasons:

- The 'high calibre ICC arbitrators' had determined the corruption issue.<sup>550</sup>
- The defendant was therefore estopped from re-trying this issue in the absence of any admissible new evidence.
- International commercial corruption does not stand in 'the scale of opprobrium quite at the level of drug-trafficking' and other 'universally condemned international activities'.<sup>551</sup>

Thus the award was enforceable because on the facts of this case, the public policy of upholding arbitral finality outweighed the public policy of discouraging corruption.<sup>552</sup>

By contrast, the minority (Waller LJ) was willing to reopen the arbitrators' decision for the following reasons:<sup>553</sup>

- There should be 'a more elaborate inquiry' into the arbitrators' rejection of the corruption issue because 'there are exceptional circumstances where the court will not allow reliance on estoppel'.
- The public policy against enforcing corrupt contracts is 'of the greatest importance and almost certainly recognised in most jurisdictions throughout the world'.
- Accordingly, if the underlying contract is tainted by bribery, then this contract should be unenforceable, and the award based on this contract should also be unenforceable. The integrity of the court process must be preserved.

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<sup>550</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 773.

<sup>551</sup> *Ibid*, 773, 775 and 776.

<sup>552</sup> *Ibid*, 773.

<sup>553</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 886.

(b) *Questions for discussion*

The judicial disagreement in the *Westacre case* on ‘the appropriate level at which to place commercial corruption’<sup>554</sup> raises two questions in the context of applying the public policy exception. First, which categories of illegal contracts fall within the public policy exception?<sup>555</sup> Second, in what circumstances will an illegal (and therefore unenforceable) contract render its resultant award unenforceable?<sup>556</sup>

On the other hand, the disagreement in the *Westacre case* on the extent of judicial inquiry also raises two questions. First, should the principle of estoppel preclude the reopening of an arbitral decision on illegality in the absence of any new evidence? Second, if the party seeks to raise new evidence, in what circumstances will such evidence be admissible?

The above questions require further examination of the English approaches before making predictions and recommendations for Australia. These discussions will include another English case, *Soleimany v Soleimany*,<sup>557</sup> as Waller LJ decided this case after Colman J’s decision but before his appellate decision in the *Westacre case*. Furthermore, the *Soleimany case* appears to be the first case in which the English Court of Appeal refused to enforce an award on the basis of public policy.<sup>558</sup>

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<sup>554</sup> Ibid.

<sup>555</sup> This is the question for stage one in applying the public policy exception – namely, whether the policy against certain illegal contracts falls within the public policy exception.

<sup>556</sup> This question of separability occurs at stage two in applying the public policy exception – namely, whether enforcing the award based on the illegal contract would violate the applicable public policy.

<sup>557</sup> *Soleimany v Soleimany* [1999] 3 All ER 847.

<sup>558</sup> Hakeem Seriki, ‘Enforcement of Foreign Arbitration Awards and Public Policy – A Note of Caution’ (2000) 3 *Arbitration and Dispute Resolution Law Journal* 192, 201; Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 724 para 26-120.

### 6.4.2 Illegality & the ‘scale of opprobrium’

Not all illegal contracts are unenforceable on the basis of public policy. Similarly, not all awards purporting to enforce illegal contracts are unenforceable under the public policy exception. Despite the judicial disagreement on the scale of opprobrium with respect to the different types of illegality, there is a ‘general agreement’ on what is known as the ‘*Lemenda* point’ on the enforceability of illegal contracts.<sup>559</sup> The English judges seem to distinguish between ‘serious illegality’ (which would render enforcement contrary to English public policy) and ‘mere illegality’ (which is ‘not sufficiently grave to justify non-enforcement’).<sup>560</sup>

#### (a) *Categories or degrees of illegality*

The starting point is Waller LJ’s statement in the *Soleimany case*:

“An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.”<sup>561</sup>

Waller LJ then elaborated on the ‘*Lemenda* point’ in the *Westacre case*:<sup>562</sup>

- First category: certain ‘rules of public policy’ (not based on ‘purely domestic considerations’), which, if violated, would render a contract unenforceable in England, ‘whatever their proper law and wherever their place of performance’.<sup>563</sup>

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<sup>559</sup> Shai Wade, ‘Westacre v Soleimany: What Policy? Which Public?’ (1999) 2 *International Arbitration Law Review* 97, 101-102.

In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 All ER 513, a contract was held to be unenforceable for contravening both the English public policy and a similar public policy in the place of performance.

<sup>560</sup> Jonathan Hill, ‘Illegality Under the Law of the Place of Performance and the Enforcement of Arbitration Awards’ (2000) *Lloyd’s Maritime and Commercial Law Quarterly* 311, 314.

<sup>561</sup> *Soleimany v Soleimany* [1999] 3 All ER 847, 862.

<sup>562</sup> Mantell LJ (Sir David Hirst concurring) expressed his agreement with Waller LJ’s view on the *Lemenda* point: *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 887. Walker J also expressed his agreement in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd’s Rep 222, 224-225.

<sup>563</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 876 (Waller LJ).

See, eg, Agreement of the International Monetary Fund (adopted 22 July 1944 and entered into force 27 December 1945) < <http://imf.org/external/pubs/ft/aa/aa08.html> > at 21 November 2005. Art VIII(2)(b)

- Second category: contracts which do not fall within the first category would be enforceable unless: (a) England is the place of performance and the contracts contravene ‘English domestic public policy’; or (b) England is not the place of performance, but the contracts contravene the domestic public policy of both the place of performance and the place of the proper law.<sup>564</sup>

Two implications arise from the *Lemenda* point. First, when determining an illegal contract’s enforceability, English courts may consider the public policies of other nations, specifically where England is neither the place of performance nor the place of the proper law. If a contract is unenforceable in England because it contravenes the public policies of other nations, does it follow that an award based on this unenforceable contract is also unenforceable under the public policy exception, even though it does not contravene the public policy of the enforcement State (ie England)? Such an extension would place England in an ‘exceptional’ position’, owing to the common understanding that the public policy exception is confined to the enforcement State’s public policies.<sup>565</sup>

Before exploring this point in the context of the *Soleimany case*,<sup>566</sup> it is useful to mention the second implication. Waller LJ’s reference to ‘domestic public policy’ together with the public policies of other nations implies ‘international public policy’ and even ‘transnational public policy’.

- According to Waller LJ, the first category refers to public policies which are not based on ‘purely domestic considerations’, but are ‘of the greatest importance and almost certainly recognised in most jurisdictions throughout the world’.<sup>567</sup>

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renders a contract ‘unenforceable in the territories of an member’, if that contract involves the currency of any member and is contrary to that member’s exchange control regulations.

<sup>564</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 876-877.

Contracts which do not fall within the first category are ‘of lesser moral turpitude’, such as the purchase of personal influence: *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 775 (Colman J); [1999] 3 All ER 864, 876 (Waller J).

<sup>565</sup> ILA Interim Report 243. See the earlier discussions in Chapter 2 section 2.2.1(a) – ‘Relativity: Public policy of the enforcement State’.

<sup>566</sup> See section 6.4.3 of this Chapter – ‘Enforceability of awards based on illegal contracts – Limits on separability’.

<sup>567</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 876 and 886.

Colman J would regard ‘universally-condemned international activities’ such as terrorism, drug-trafficking, prostitution and paedophilia as falling within this category.<sup>568</sup> These explanations and examples resemble international public policy and even transnational public policy.<sup>569</sup>

- In the second category (a), contravention of England’s domestic public policy is sufficient to render the contract unenforceable because England is the place of performance. Yet the narrow approach to the public policy exception would require contravention of England’s international public policy to refuse enforcement of an award based on that unenforceable contract.
- In the second category (b), a contract which contravenes the domestic public policy of both the place of performance and the place of the proper law is unenforceable in England, even if that contract does not contravene England’s domestic public policy. One reason for non-enforcement is the need to preserve the integrity of the court process.<sup>570</sup> Comity is another reason, since preserving England’s diplomatic relationships with other nations may also be part of England’s international public policy.<sup>571</sup>

The imprecise categorisation of public policy as domestic, international and transnational can indeed lead to an unruly application of the public policy exception.

**(b) *Is corruption within the public policy exception?***

The judges in the *Westacre case* disagreed on the application of the *Lemenda* point. Waller LJ would regard illegality by reason of corruption as falling within the first category of *Lemenda*, as well as within the public policy exception.<sup>572</sup>

Yet Colman J’s view appears somewhat ambiguous. For Colman J, ‘anything short of corruption or fraud in international commerce’ would fall outside the first category of *Lemenda*.<sup>573</sup> This implies that corruption may fall within the first category. However,

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<sup>568</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 775.

<sup>569</sup> See the earlier discussions in Chapter 3 section 3.6.4 – ‘Overlapping categories of public policy’.

<sup>570</sup> This is explicit in Waller LJ’s judgment in *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 886.

<sup>571</sup> This is implicit in Waller LJ’s judgment in *Soleimany v Soleimany* [1999] 3 All ER 847, 859 and 862.

<sup>572</sup> See *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 886.

<sup>573</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 775.

Colman J then emphasised that corruption is ‘far down the scale in comparison with drug-trafficking’.<sup>574</sup> Presumably this means that corruption falls within the first category of *Lemenda* but does not necessarily fall within the public policy exception. This warrants further examination, since the majority in the *Westacre case* refused to reopen the arbitral finding on the corruption issue after concluding that the public policy of upholding arbitral finality outweighed the public policy of discouraging corruption.<sup>575</sup>

#### 6.4.3 Enforceability of awards based on illegal contracts – Limits on separability

According to the ‘doctrine of separability’ (which is also known as the ‘severability’ or ‘autonomy of the arbitration clause’), because an arbitration agreement is separate and independent from the underlying contract, the termination or the illegality of the underlying contract may not affect the arbitration agreement.<sup>576</sup> In the context of enforcement of arbitral awards, the English courts have consistently emphasised that their concern is the enforcement of an award rather than the contract underlying that award, ‘albeit the award is not isolated from the underlying contract’.<sup>577</sup> However, does the doctrine of separability mean that the illegality of the underlying contract cannot affect an award in respect of that illegal contract?<sup>578</sup> This is essentially a question of exactly what must be contrary to public policy.

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<sup>574</sup> Ibid, 776.

<sup>575</sup> See further discussions in section 6.4.5 of this Chapter – ‘Applying the public policy exception to awards based on illegal contracts’.

<sup>576</sup> See, eg, Model Law Art 16(1): “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

See also Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 193; Paul Obo Idornigie, ‘Anchoring Commercial Arbitration on Fundamental Principles’ (2004) 23 *The Arbitrator & Mediator* 65, 72-73; Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 122-123.

It is noteworthy that in *O’Callaghan v Coral Racing Ltd* (Unreported, Sir Christopher Slade, Hirst and May LJ, 19 November 1998), the English Court of Appeal held that an arbitration agreement was unenforceable because the underlying contract was void by virtue of the English gambling legislation. Despite the doctrine of separability, the Court treated the arbitration agreement as part and parcel of the void contract and therefore it could not survive independently.

<sup>577</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 877 (Waller LJ). See also *Soinco SACI v Norokuznetsk Aluminium Plant* (1998) 13 Mealey’s International Arbitration Report C-1, para 6 (Waller LJ); *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd’s Rep 222, 225.

<sup>578</sup> Adam Johnson, ‘Illegal Contracts and Arbitration Clauses’ (1999) 2 *International Arbitration Law Review* 35.

It has been suggested that the enforcement court ‘must be able to isolate an element of the award and demonstrate that the enforcement of an award tainted by such an element would violate the public policy of its forum’.<sup>579</sup> The ILA recommends non-enforcement only ‘where the dispositive aspect of the award requires the doing of some act which is unequivocally prohibited in the forum’.<sup>580</sup> The ILA’s formulation appears narrower, as its focus on the conduct compelled by the award may not include the substantive claim on which the award is based.<sup>581</sup>

**(a) *Non-enforcement of domestic awards on the basis of public policy***

In the *Soleimany case*,<sup>582</sup> Waller LJ refused to enforce a domestic award on the basis of public policy. The award in that case gave effect to a contract for smuggling carpets which was illegal in the place of performance (Iran). After analysing the case law on the enforceability of illegal contracts and foreign judgments which enforce illegal contracts, Waller LJ stated that English courts will not enforce a foreign judgment which recognises and enforces an illegal contract, specifically a contract which is made with the object of committing an illegal act in a foreign and friendly state.<sup>583</sup> Waller LJ then concluded that the same approach would apply to an award which purports to enforce an illegal contract.<sup>584</sup> Such non-enforcement is not for the parties’ sake, but ‘to preserve the integrity of [the court] process, and to see that it is not abused’.<sup>585</sup> Accordingly, Waller LJ refused to enforce the award in which the arbitrator found that the contract was illegal in the place of performance, but held that under the proper law of the contract (Jewish law), such illegality did not affect the parties’ rights under the contract,

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<sup>579</sup> Okezie Chukwumerije, ‘Enforcement of Foreign Awards in Australia: The Implications of Resort Condominiums’ (1994) 5 *Australian Dispute Resolution Journal* 237, 246.

<sup>580</sup> ILA Interim Report 232.

<sup>581</sup> Cf Gary Born, *International Commercial Arbitration* (2<sup>nd</sup> ed, 2001) 830 on the US position: “It is not clear whether the public policy exception in the US requires proof that enforcement of the arbitral award itself would violate the applicable public policy or compel conduct that would violate a public policy... Alternatively, and more likely, the public policy exception in the US courts is implicated where the substantive claim on which the award is based is contrary to applicable public policy.”

<sup>582</sup> *Soleimany v Soleimany* [1999] 3 All ER 847.

<sup>583</sup> *Ibid*, 854 and 856.

<sup>584</sup> *Ibid*, 862.

<sup>585</sup> *Ibid*, 859.

The New Zealand Court of Appeal referred approvingly to this approach in *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] NZCA 17, para 46.



including the entitlement to the proceeds of sale. The award was unenforceable because it referred ‘on its face to an illegal object to the enterprise which the English court views as contrary to public policy’.<sup>586</sup>

Thus the *Soleimany case* indicates that Waller LJ would refuse to enforce an award if:

- (a) the underlying contract is illegal in the place of performance or the place of the proper law;
- (b) the place of performance or the place of the proper law is either England or a foreign and friendly state; and
- (c) the award purports to enforce the illegal contract.<sup>587</sup>

Waller LJ’s rationale for this approach seems two-fold. The enforcement of an award purporting to enforce an illegal contract indirectly enforces that illegal contract, and therefore damages the integrity of the judicial process.

However, it should be emphasised that the *Soleimany case* is an example of non-enforcement of a domestic award for public policy reasons. It is uncertain whether Waller LJ would have applied the public policy exception to refuse enforcement if the relevant award had been a foreign award.<sup>588</sup>

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<sup>586</sup> *Soleimany v Soleimany* [1999] 3 All ER 847, 863.

<sup>587</sup> This is somewhat different from Waller LJ’s later formulation in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 877, which requires illegality under both the place of performance and the place of the proper law: “It is legitimate to conclude that there is nothing wrong which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.”

One possible reason for such difference is that the *Soleimany case* involved a domestic award whereas the *Westacre case* involved a foreign award. See further discussions in the next section of this Chapter – ‘Non-enforcement of foreign awards under the public policy exception’.

<sup>588</sup> Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 724 para 26-120.

**(b) *Non-enforcement of foreign awards under the public policy exception***

Contrast the two distinguishing features of the *Westacre case* – the involvement of a foreign award, and the arbitrators’ rejection of the illegality claim.<sup>589</sup> In response to the argument that the award should be ‘insulated’ from the illegal contract ‘for the purposes of the public policy exception to the enforcement of Convention awards and indeed at common law’,<sup>590</sup> Colman J stated:

“If...the direct enforcement of the underlying contract...would be contrary to public policy, it follows that the enforcement of an arbitration award which gave effect to the rights and obligations under that contract could only be consistent with public policy if the interposition of the dispute resolution machinery provided by the arbitration agreement...displaced that aspect of public policy which would treat enforcement of the underlying contract as offensive. Given the parasitic or ancillary nature of the arbitration agreement, that proposition would at first sight appear to be difficult to sustain.”<sup>591</sup>

However, the ‘crucial question’ for Colman J is whether ‘the public policy in favour of finality is overridden by some more important public policy based on the unenforceability of illegal contracts’:

“it does not follow that, merely because an underlying contract is void at common law because direct enforcement would be contrary to public policy, enforcement of an international arbitration award which treated that contract as enforceable would itself automatically be contrary to public policy.”<sup>592</sup>

Colman J’s balancing between finality and illegality was prompted by the fact that both the arbitral tribunal and the supervisory court had rejected the illegality claim, as well as by the discretionary nature of Art V and the New York Convention’s public policy paradox. Waller LJ did not have to engage in this balancing exercise in the *Soleimany case* because the award in that case was not subject to the New York Convention.

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<sup>589</sup> As Waller LJ acknowledged in *Soleimany v Soleimany* [1999] 3 All ER 847, 856: “Different considerations may apply where there is a finding by the foreign court to the contrary or simply no such finding, and one party now seeks such a finding from the enforcing court.”

<sup>590</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 751-752.

<sup>591</sup> *Ibid*, 755.

<sup>592</sup> *Ibid*, 765-766 and 768.

Nevertheless, after reiterating his concerns about preserving judicial integrity, Waller LJ commented in the *Westacre case* that, if the contract were procured by bribery, then an English court should neither enforce that contract nor enforce the award based on that contract.<sup>593</sup> This indicates that Waller LJ may not decide the *Soleimany case* differently even if the award in that case were a foreign award. He would, after the balancing exercise, still refuse to enforce the award based on the illegal smuggling contract. For Waller LJ, abuse of court process arising from judicial enforcement or endorsement of illegality would fall within the public policy exception.

Subsequently in *OTV v Hilmarton*,<sup>594</sup> a foreign award in which the arbitrators rejected the illegality claim, was allowed enforcement. After distinguishing the *Soleimany case*, Walker J confirmed that, in the context of the New York Convention, it is insufficient to establish that the underlying contract is unlawful in its place of performance – it is necessary to establish that the illegality ‘infects the award as well’.<sup>595</sup> In that case, the ICC arbitrators concluded that the contract which breached the law of the place of performance (Algerian law) remained valid under the proper law (Swiss law), since it did not involve any bribery or corruption.<sup>596</sup> In upholding the award’s enforceability, Walker J commented that such enforcement would not offend ‘international comity’ as it was not a direct enforcement of the underlying contract.<sup>597</sup>

Accordingly, both the *Westacre case* and *OTV v Hilmarton* illustrate that English courts may still enforce an award based on a contract which is illegal in the place of performance, if the arbitrator finds that the contract is valid under the proper law of the contract.<sup>598</sup> The fact that English law may view the contract as illegal is insufficient to override the pro-enforcement policy and thereby justify non-enforcement of the resultant award under the public policy exception.

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<sup>593</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 886.

<sup>594</sup> *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222.

<sup>595</sup> *Ibid*, 223 and 224.

<sup>596</sup> The relevant Algerian legislation prohibited the use of intermediaries in obtaining public works contracts.

<sup>597</sup> *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222, 225.

<sup>598</sup> Ewan Brown, 'Illegality and Public Policy – Enforcement of Arbitral Awards in England: *Hilmarton v Omnium de Traitement et de Valorisation S.A.*' (2000) 3 *International Arbitration Law Review* 31.

In both the *Westacre case* and *OTV v Hilmarton*, the underlying contracts were illegal in their place of performance but remained valid under the proper law of the contract.

Thus these English cases have been interpreted as demonstrating a narrow approach to the public policy exception, notably the application of international public policy.<sup>599</sup>

(c) *Lessons for Australia*

The *Westacre case* and *OTV v Hilmarton* appear more willing than the *Soleimany case* to extend the doctrine of separability in order to allow enforcement of arbitral awards. Their deference to the pro-enforcement policy may have been caused by the arbitrators' rejection of the alleged illegality, as well as by the nature and degree of the alleged illegality.<sup>600</sup>

Since the public policy exceptions in the New York Convention, Model Law and Australia's IAA expressly state that it is the enforcement of an award that must be contrary to public policy,<sup>601</sup> an award's enforcement is not necessarily contrary to Australian public policy simply because that award is based on, or is otherwise associated with, an illegal contract. However, mindful of preserving judicial integrity, Australian courts may consider the following recommendations.

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<sup>599</sup> See, eg, ILA Interim Report 227; Audley Sheppard, 'Whether Enforcement of a Foreign Award Should be Refused as Contrary to English Public Policy, on the Ground that the Underlying Agreement was Illegal under the Law of the Place of Performance' (1999) 2 *International Arbitration Law Review* N46; Ewan Brown, 'Illegality and Public Policy – Enforcement of Arbitral Awards in England: *Hilmarton v Omnium de Traitement et de Valorisation S.A.*' (2000) 3 *International Arbitration Law Review* 31.

<sup>600</sup> These three English cases are partially reconcilable on their factual differences. For instance, unlike the arbitrator's admission of illegality in the *Soleimany case*, the defendants in both the *Westacre case* and *OTV v Hilmarton* failed to establish illegality because of the courts' refusal to reopen or disturb the arbitrators' findings of no illegality. See Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration* (2003) 418; Richard Kreindler, 'Aspects of Illegality in the Formation and Performance of Contracts' (2003) 6 *International Arbitration Law Review* 1, 24-25.

<sup>601</sup> Both New York Convention Art V(2)(b) and Model Law Art 36(1)(b)(ii) refer to 'the recognition or enforcement of the award', while IAA s 8(7)(b) uses the phrase 'to enforce the award'.

***Recommendation 2: Enforceability of awards based on illegal contracts***

- (a) The award must be tainted or otherwise affected by the illegality of its underlying contract, such that its enforcement would be contrary to the applicable mandatory rules of public policy.
- (b) Accordingly, an award may be unenforceable in Australia if: (i) Australia is either the place of performance or the place of the proper law; (ii) the underlying contract is illegal and therefore unenforceable in Australia; and (iii) the award purports to enforce this illegal contract (for instance, by compelling, rewarding, or otherwise condoning the performance of the illegal contract).

It is possible that Australian courts may place corruption at a higher level of opprobrium than the majority in the *Westacre case*. Section 19(a) of the IAA declares that an award is ‘in conflict with the public policy of Australia’ if the making of that award is ‘induced or affected by fraud or corruption’. At first glance, this provision seems primarily concerned with procedural public policies with respect to the making of an award.<sup>602</sup> However, corruption which induces or affects the underlying contract can also affect the making of the resultant award. The word ‘corruption’ in IAA s 19(a) is not necessarily confined to situations involving ‘breach of the rules of natural justice’ or due process, otherwise s 19(b) would be unnecessary and redundant.<sup>603</sup> In any event, there is an emerging ‘international consensus’ that corruption and bribery should fall within the public policy exception.<sup>604</sup>

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<sup>602</sup> The ILA would view s 19(a) as ‘examples of breaches of procedural public policy’: see ILA Final Report 256.

See also the earlier discussions on IAA s 19 in Chapter 2 section 2.3.2 – ‘Public policy vs *Ordre public*’.

<sup>603</sup> IAA s 19(b) deems an award to be in conflict with the Australian public policy if ‘a breach of the rules of natural justice occurred in connection with the making of the award’.

For further discussions on due process, see section 6.5 of this Chapter.

<sup>604</sup> See the various multilateral and regional conventions on corruption (as cited in Chapter 3 section 3.6.4), including the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions (signed on 17 December 1997 and became effective on 15 February 1999), and the United Nations Convention Against Corruption (9 December 2003).

On the other hand, it remains to be seen whether the Australian High Court will extend the proportionality principle to the enforcement of awards arising from illegal contracts. Recall Kirby J applied this principle to the enforcement of illegal contracts in *Fitzgerald v Leonhardt*.<sup>605</sup> As noted by Gleeson CJ of the Australian High Court, the civil law principle of proportionality ‘is becoming influential in Australia’, partly because of its similarity with the common law concept of reasonableness.<sup>606</sup>

It is also uncertain whether the Australia High Court will apply the proportionality principle to the next issue concerning judicial review of arbitral decisions.

#### **6.4.4 Reopening arbitral finding on illegality – Limits on judicial inquiry**

Does the doctrine of separability also mean that, if the arbitrator determines that the underlying contract is not illegal, then the enforcement court cannot look behind the award to refuse enforcement under the public policy exception?<sup>607</sup> The enforcement court may encounter this issue when determining whether there is public policy violation at stage two of applying the public policy exception.

According to the English approach, the preliminary question is whether the arbitrator has jurisdiction to consider the illegality issue. Owing to the close relationship between illegality, public policy and arbitrability, the enforcement court needs to examine whether the nature of the alleged illegality invalidates the underlying contract as well as the arbitration agreement.<sup>608</sup> If it is within the arbitrator’s jurisdiction to consider the illegality issue, then *prima facie* the court would enforce the award.<sup>609</sup>

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<sup>605</sup> *Fitzgerald v FJ Leonhardt Pty Ltd* [1997] HCA 17, as discussed in section 6.4 of this Chapter.

<sup>606</sup> Chief Justice Murray Gleeson, ‘Global Influences on the Australian Judiciary’ (2002) 22 *Australian Bar Review* 184, 188 and 189.

<sup>607</sup> Adam Johnson, ‘Illegal Contracts and Arbitration Clauses’ (1999) 2 *International Arbitration Law Review* 35; Michael Hwang and Andrew Chan, ‘Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries’ in Albert Jan van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (2001) 145, 161.

<sup>608</sup> See eg, Colman J in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 758 and 767; Waller LJ in *Soleimany v Soleimany* [1999] 3 All ER 847, 857.

For discussions on the overlap between the arbitrability exception and the public policy exception, see Chapter 5 section 5.4.1.

<sup>609</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 768 and 770-771 (Colman J).

Unfortunately the English judges have yet to reach a consensus on the main issue of whether and when the enforcement court can reopen an arbitral finding of no illegality. They have differed in balancing between, on the one hand, the public policies against the abuse of judicial process and therefore against the enforcement of illegal contracts, and on the other hand, the public policies in favour of arbitral finality and therefore against reopening awards on their merits.

**(a) *Westacre case: Preliminary inquiry before estoppel?***

According to Waller LJ's obiter in the *Soleimany case*, the enforcement court should 'inquire further to some extent' if there is 'prima facie evidence' that the award is based on an illegal contract:

"[The] judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality."<sup>610</sup>

Waller LJ would ask the following questions:

"Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality?"<sup>611</sup>

However, none of the other judges in the *Westacre case* endorsed Waller LJ's approach. Colman J held that the defendant was estopped from conducting a re-trial of the same issue under the guise of public policy.<sup>612</sup> Mantell LJ and Sir David Hirst expressed concerns about Waller LJ's 'some kind of preliminary inquiry short of a full trial', and 'even greater concerns' about applying this concept in practice.<sup>613</sup> Furthermore, even

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<sup>610</sup> *Soleimany v Soleimany* [1999] 3 All ER 847, 859 and 862. Remarkably, Waller LJ said that it was 'in the public interest' to 'express some view' on this issue, even though this issue did not arise in that case.

<sup>611</sup> *Ibid*, 859.

<sup>612</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 771.

<sup>613</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 887.

the application of Waller LJ's 'guidelines' would lead to the same conclusion that the defendant's attempt to reopen the facts 'should be rebuffed'.<sup>614</sup>

On the issue of **estoppel**, Waller LJ acknowledged that 'there are exceptional circumstances where the court will not allow reliance on estoppel' – for instance, 'where the evidence of illegality is so strong that if not answered it would be decisive of the case'.<sup>615</sup> He suggested that the enforcement court should balance 'competing public policies' when determining whether it will allow reopening.<sup>616</sup> The factors in this balancing exercise included the nature of illegality, the strength of the illegality claim, and the extent to which the arbitrator addressed the illegality claim.<sup>617</sup>

However, Mantell LJ disagrees that the seriousness of illegality is relevant to the question of whether further inquiry is warranted:

“The seriousness of the alleged illegality... is not a factor to be considered at the stage of deciding whether or not to mount a full scale inquiry. It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely should the award be enforced.”<sup>618</sup>

Commentators are also critical of Waller LJ's concept of preliminary inquiry in response to the prima facie evidence of illegality.<sup>619</sup> However, despite appearing less pro-enforcement, Waller LJ's approach is defensible under, or at least consistent with, the New York Convention. For instance, Art V(2)(b) allows the enforcement court to examine the applicability of the public policy exception *ex officio* (ie on its own motion).

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<sup>614</sup> Ibid. Mantell LJ's four reasons were: (1) straightforward commercial contract; (2) arbitrators' specific finding of no illegality; (3) no indication of arbitrators' incompetence; (4) no reason to suspect collusion or bad faith in obtaining the award.

<sup>615</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 882-883.

<sup>616</sup> Ibid, 883.

<sup>617</sup> Ibid, citing *Soleimany v Soleimany* [1999] 3 All ER 847.

<sup>618</sup> Ibid, 887-888.

<sup>619</sup> See, eg, Shai Wade, 'Westacre v Soleimany: What Policy? Which Public?' (1999) 2 *International Arbitration Law Review* 97, 97: "to decide whether a judge can give an arbitrator's award full faith and credit, he would probably have to conduct, if not a full trial, a significant investigation of the matters considered by the arbitral tribunal."



Furthermore, the discretionary nature of Art V enables the enforcement court to conduct such balancing exercise, albeit at the earlier stage of deciding whether to inquire further into the illegality issue. Indeed, the enforcement court cannot properly determine whether the enforcement of an award based on an allegedly illegal contract would be contrary to public policy, unless it is satisfied that the contract is indeed illegal. Here the seriousness of the alleged illegality is highly relevant. The enforcement court should consider this factor at the preliminary stage, rather than waiting for the second stage of determining the award's enforceability – a stage which may not arise. The enforcement court should not defer to the arbitral finding on illegality too readily, for arbitral finality should not be upheld at the expense of arbitral justice.

On the other hand, it is arguable that Waller LJ's preliminary inquiry infringes the 'no merits review' principle. However, most of Waller LJ's questions are concerned with the arbitrator's incompetence or misconduct, improper procurement of an award by collusion or bad faith. The enforcement court can *ex officio* consider these questions concerning due process and other procedural public policies under the public policy exception. Australia's IAA s 19 also deems awards affected by fraud, corruption or breach of due process to conflict with Australian public policy. Furthermore, ILA Resolution Rec 3(c) resembles Waller LJ's concept of preliminary inquiry, although it does not apply to all public policies falling within the public policy exception.<sup>620</sup> The enforcement court should not enforce an award that has been procured by the arbitrator's incorrect or improper rejection of the alleged illegality or other public policy violations.<sup>621</sup>

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<sup>620</sup> See the earlier discussions in section 6.3 of this Chapter – 'No merits review?'.

Most cases of illegality (at least statutory illegality) would violate the ILA's notion of 'public policy rules'.

<sup>621</sup> Andrew Rogers and Mathew Kaley, 'The Impact of Public Policy in International Commercial Arbitration' (1999) 65 (4) *Arbitration* 326, 332.

**(b) *Crystal-gazing the Australian approach***

To date there is a handful of Australian cases which have considered the *Soleimany case* or the *Westacre case*, notably *Corvetina Technology Ltd v Clough Engineering Ltd*.<sup>622</sup> This New South Wales Supreme Court decision concerned an interlocutory application against court order for discovery. It raised the question of whether the defendant is entitled to raise the public policy exception in IAA s 8(7)(b), specifically to allege that the underlying contracts were contrary to the public policy of Australia or the place of performance (Pakistan). Like the *Westacre case*, the arbitrator had rejected the alleged public policy violation. Unfortunately, McDougall J declined to resolve this estoppel-related question in this interlocutory proceeding.<sup>623</sup> He nevertheless made some noteworthy comments.

Regarding Waller LJ's concept of preliminary inquiry into the arbitral finding on illegality, McDougall J noted that this obiter in the *Soleimany case* 'was not intended to be definitive', and had 'at the very least' caused Mantell LJ's 'slight scepticism' in the *Westacre case*.<sup>624</sup> Regarding Colman J's proposition on reopening the arbitral finding on illegality, McDougall J said:

"it is open in principle to a defendant..., to seek to rely on illegality, pursuant to [IAA] s 8(7)(b) or its equivalent, even if the illegality was raised before and decided by the arbitrator. I do not see anything in the decision of Mantell LJ in *Westacre* to the contrary."<sup>625</sup>

It seems that McDougall J either overlooked Colman J's qualification in his proposition (which requires 'facts not placed before the arbitrators' to justify reopening), or agreed with Waller LJ's more liberal approach (which does not require new evidence).<sup>626</sup>

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<sup>622</sup> *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700 (McDougall J).

Other Australian cases include *Mond v Berger* [2004] VSC 45 (concerning annulment of domestic arbitral award on the basis of arbitrator's misconduct); and *Stern v National Australia Bank* [1999] FCA 1421 (concerning the public policy exception to the enforcement of foreign judgment).

<sup>623</sup> *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700, para 18.

However, at para 7, McDougall J made an interesting (if not perplexing) comment that he is 'not sure' that 'this is a question of substantial practical importance'.

The final hearing of the *Covertina case* is still pending as at the date of this thesis.

<sup>624</sup> *Ibid*, paras 11 and 14.

<sup>625</sup> *Ibid*, para 14.

<sup>626</sup> For further discussions on the requirement for new evidence, see section 6.4.6 of this Chapter'.

According to the passage below, not only does McDougall J share Waller LJ's concerns about preserving judicial process, it also indicates McDougall J's willingness to engage in some form of inquiry, even if this may involve merits review:

"The very point of provisions such as s 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that it required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion, which is expressly referred to it, simply because of some 'signal' that this might send to people who engage in arbitrations under the [IAA]."<sup>627</sup>

Indeed, it may be necessary to look behind or beyond the award to examine why and how the arbitrator decided against the alleged public policy violation.

In addition, the enforcement court may need to consider the interests of the public, which are seldom represented in the arbitral proceedings. In the US case of *Baxter International Inc v Abbott Laboratories*,<sup>628</sup> the awards granted one party monopoly in the US sevoflurane market. The majority of the US Court of Appeals allowed enforcement after refusing to reopen the arbitral finding of no violation of US antitrust law. However, dissenting Judge Cudahy emphasised the need to fulfil 'judicial responsibilities and examine the effect of the outcome commanded by the arbitral award'.<sup>629</sup> He also cautioned that 'too deferential an attitude by the courts when the rights of the consuming public are at stake can severely undermine the foundations of [the US] economy'.<sup>630</sup> This dissenting judgment illustrates that, when deciding whether to reopen the arbitral findings in the context of applying the public policy exception, the enforcement court may need to balance the interests of both of the arbitration parties and the public at large.

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<sup>627</sup> *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700, para 18.

McDougall J continued: "On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy."

<sup>628</sup> *Baxter International Inc v Abbott Laboratories*, 315 F 3d 829 (7<sup>th</sup> Cir, 2003).

<sup>629</sup> *Ibid*, 836.

<sup>630</sup> *Ibid*, 838.

This delicate balancing act awaits the Australian High Court. Perhaps the extent of judicial inquiry should be proportionate to the seriousness of the alleged illegality? The High Court's application of the proportionality principle in this context may be unlikely, but not impossible.<sup>631</sup>

#### 6.4.5 Applying the public policy exception to awards based on illegal contracts

The ultimate 'tug-of-war'<sup>632</sup> between the majority and minority in the *Westacre case* lies in their balancing of public policies. In balancing between the pro-enforcement policy (specifically respect for arbitral finality) and the public policy against illegal contracts (specifically discouragement of international commercial corruption), the judges weighed the pertinent factors differently, and even considered different factors. The majority's placement of corruption on the lower scale of opprobrium is the primary reason for their refusal to reopen the arbitral finding against corruption.

##### (a) *Westacre case: Revisiting corruption & the scale of opprobrium*

The table below summarises the balancing factors for determining whether to reopen the arbitral decision on the corruption issue in the *Westacre case*.

For enforcement	Against enforcement
<ul style="list-style-type: none"> <li>Public policy of respecting arbitral finality (more weighty for the majority?)</li> <li>Determination of the illegality issue by competent arbitrators (weighty for the majority, which strengthens the need for finality)<sup>633</sup></li> </ul>	<ul style="list-style-type: none"> <li>Public policy of discouraging international commercial corruption (more weighty for the minority?)</li> <li>Public policy of preserving the integrity of the court process (raised by the minority only?)</li> </ul>

<sup>631</sup> The principle of proportionality has not been accepted in Australia as a separate ground for judicial review of administrative decisions, presumably because of the complementary principle which allows a 'margin of appreciation' or 'deference' to the decisions of administrative authorities: see Chief Justice Murray Gleeson, 'Global Influences on the Australian Judiciary' (2002) 22 *Australian Bar Review* 184, 189-190.

<sup>632</sup> Shai Wade, 'Westacre v Soleimany: What Policy? Which Public?' (1999) 2 *International Arbitration Law Review* 97, 101.

<sup>633</sup> By contrast, Waller LJ was willing to conduct further inquiry into this issue before deciding whether or not to reopen the arbitrators' decision.

For Colman J, the public policy of discouraging ‘corruption amongst foreign corporations and governments’ did not outweigh the public policy of ‘sustaining international arbitration awards’.<sup>634</sup>

“No doubt, if it were proved that the underlying contract was...one involving drug trafficking, the alleged offensiveness of the transaction would be such as to outweigh any countervailing consideration. Where, however, the degree of offensiveness is as far down the scale as in the present case, I see no reason why the balance of policy should be against enforcement.”<sup>635</sup>

Colman J stressed that this conclusion does not mean that he would ‘turn a blind eye to corruption’ – it simply expresses his confidence that if ‘high calibre’ arbitrators have duly determined the illegality issue, then it would be ‘entirely inappropriate in the context of the New York Convention’ for the enforcement court to retry that very issue under the public policy exception.<sup>636</sup>

Sir David Hirst expressly agreed that Colman J ‘struck the correct balance’ and ‘gave ample weight to the opprobrium attaching to commercial corruption’.<sup>637</sup>

It is not surprising that Waller LJ, who condemned carpet smuggling in the *Soleimany case*, would attach more weight to the public policy against corruption than Colman J:

“I disagree with [Colman J] as to the appropriate level of opprobrium at which to place commercial corruption. It seems to me that the principle against enforcing a corrupt bargain of the nature of this agreement...is within that bracket recognised by...*Lemenda*...as being based on the public policy of the greatest importance and almost certainly recognised in most jurisdictions throughout the world.”<sup>638</sup>

Unlike Colman J, Waller LJ would regard corruption as falling within the first category of *Lemenda* and therefore within the public policy exception. He was prepared to reopen the arbitral decision on corruption. And he would refuse enforcement if the award purported to enforce a corrupt and therefore illegal contract.

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<sup>634</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 773. This is despite Colman J’s recognition that ‘commercial corruption is deserving of judicial and government disapproval’.

<sup>635</sup> *Ibid*, 776.

<sup>636</sup> *Ibid*, 773.

<sup>637</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 888.

<sup>638</sup> *Ibid*, 886.

**(b) Critique: Unruly application of the public policy exception?**

Colman J's approach in the *Westacre case* exemplifies the narrow approach to the public policy exception – an approach whose desirability is subject to ongoing scholarly debate.<sup>639</sup> It may be inappropriate to criticise how he balances the pertinent factors. For example, whether drug-trafficking is more serious than commercial corruption, or whether more weight should be attached to arbitral finality than to the discouragement of corruption. Nevertheless, Colman J's decision to enforce the award as a result of his refusal to reopen the arbitral decision seemingly sends mixed messages.

The first message is that the anti-corruption policy does not outweigh the pro-enforcement policy and therefore does not fall within the public policy exception. In other words, the award is enforceable because there is no applicable public policy and therefore no public policy violation.

The alternative second message is that the anti-corruption policy does fall within the public policy exception, however it does not outweigh the competing policy favouring finality and therefore does not justify reopening of the arbitral finding on the alleged corruption. In other words, the award is enforceable without examining the alleged public policy violation.

Owing to the public policy paradox of the New York Convention and the discretionary nature of the exceptions to enforcement in Art V, both stages one and three in the application of the public policy exception enable, if not require, the enforcement court to balance competing interests. The enforcement court may also need to carry out such balancing exercise at stage two. For instance, if the arbitrator has addressed issues relating to the alleged public policy violation, then the enforcement court will need to determine whether to reopen this decision after weighing the competing interests. No wonder the application of the public policy exception can be unruly!

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<sup>639</sup> See, eg, Donna Bates, 'A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-border Consumer Disputes?' (2004) 27 *Fordham International Law Journal* 823, 876; Vesselina Shaleva, 'The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19 *Arbitration International* 67, 74-75.

In the *Westacre* case, the judges had to conduct a balancing exercise at stage two in order to determine whether to reopen the arbitral finding against corruption. If Colman J treated this question as a preliminary issue to determining the applicability of the public policy exception (which he did), then logically he would determine this issue even before stage one. Yet he determined this preliminary issue while applying the public policy exception at the same time.

Perhaps Colman J, at stage one, assumed that the anti-corruption policy fell within the public policy exception, apparently without balancing the relevant public policies. Then at stage two, Colman J concluded that the balance of policy was against reopening. In evaluating the relative importance of the competing public policies (which he should have done at stage one), he apparently attached more weight to the public policy favouring arbitral finality due to his confidence in the arbitrators' competence. By contrast, he attached less weight to the public policy against corruption, owing to his view that, unlike those 'universally-condemned international activities' which 'outweigh any counteracting considerations', corruption is 'far down the scale'.<sup>640</sup>

Colman J's ultimate answer to the preliminary question (ie no reopening) meant that he did not need to fully answer the second question concerning the award's enforceability in light of the alleged public policy violation. Can an award be enforced without a thorough examination of its enforceability? This leads to the following suggestions:

- The enforcement court should determine the issue of whether to reopen an arbitral finding in the context of applying the public policy exception. In other words, this issue is preliminary to, but is not independent from, the issue of enforceability of award. This is because the enforcement court should determine the applicability of the public policy exception whenever there is an alleged public policy violation. More importantly, whether an award is enforceable under the public policy exception depends on whether the enforcement court is willing to reopen the arbitral decision on the alleged public policy violation.

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<sup>640</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 776.

- In applying the public policy exception, the enforcement court should reach a conclusion on whether or not the alleged public policy falls within the public policy exception. In other words, the court should reach a definitive answer at stage one. This will then assist the court in determining whether or not to reopen the arbitral finding – otherwise the court cannot properly balance the competing policies.
- If the anti-corruption policy does not fall within the public policy exception, then the enforcement court should refuse reopening. The enforcement court can stop at this stage, for there is no applicable public policy, and therefore the public policy exception is inapplicable.
- On the contrary, if the anti-corruption policy does fall within the public policy exception, then the enforcement court should be more cautious before refusing to reopen the arbitral finding on the alleged public policy violation. In balancing the competing policies and other relevant factors, the court should not re-question or re-examine whether the anti-corruption policy falls within the public policy exception. For instance, it would be inappropriate for the enforcement court to refuse reopening simply on the basis that the anti-corruption policy does not fall within the public policy exception, or does not outweigh the policy favouring finality. To do so would contradict the court's earlier conclusion at stage one. There are different degrees of illegality, just as some public policies are more important than others. Nevertheless, public policies which fall within the public policy exception are sufficiently important to outweigh the pro-enforcement policy. Their importance should not be re-questioned or re-examined when determining whether to reopen an arbitral decision on the alleged public policy violation.
- Instead, the enforcement court may wish to inquire further into the arbitrator's handling of the corruption issue. This is akin to Waller LJ's concept of preliminary inquiry. The court may also consider whether the consequences of the alleged corruption justify reopening. This is to ensure that the court's decision against reopening will not cause or condone any injustice.



- If the enforcement court decides against reopening despite its view that the anti-corruption policy falls within the public policy exception, then it should expressly state that enforcing the award would not contravene such public policy, as the arbitrator has decided that there would be no such contravention. Leaving stage two incomplete is likely to cause confusion and controversy.

The enforcement court should not apply the narrow approach to the public policy exception at the expense of judicial clarity and consistency. It should avoid an unruly application of the already unruly public policy exception.

#### **6.4.6 Admissibility of new evidence of illegality**

In what circumstances will the enforcement court admit new evidence of public policy violation which was not raised before the arbitrator? The admissibility of such evidence directly affects the prospects of establishing the public policy exception.

##### **(a) *Westacre case: Pursuit of local supervisory remedies?***

In the *Westacre case*, the new argument about witnesses' perjury at arbitration also failed as it was inadmissible on balance of public policies. According to Colman J:

"If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of award in general and of awards in respect of the same issue in particular."<sup>641</sup>

Waller LJ agreed with this proposition, except he disagreed with limiting this proposition to 'cases where there were relevant facts not put before the arbitrator'.<sup>642</sup> This led to Waller LJ's dissent on the issue of reopening the arbitral finding on corruption.<sup>643</sup>

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<sup>641</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 768. This is known as Colman J's 'sixth proposition' derived from his survey of the relevant authorities.

<sup>642</sup> *Soleimany v Soleimany* [1999] 3 All ER 847, 862.

<sup>643</sup> *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] NZCA 17, para 54.

It is remarkable that all the judges in the *Westacre case* were against extending the ‘*Abouloff* principle’<sup>644</sup> to foreign awards. This principle permits the reopening of foreign judgments on the basis of fraud even in the absence of any new evidence, in contradistinction to the requirement of new evidence for reopening domestic judgments. The status of the *Abouloff case* in England is somewhat uncertain. While the House of Lords did not overrule it in *Owens Bank Ltd v Bracro*,<sup>645</sup> subsequent cases have distinguished it. For instance, in *House of Spring Gardens Ltd v Waite*,<sup>646</sup> it was confirmed that a party would be estopped from re-litigating the same issue of fraud which has been rejected by the foreign court.

For Colman J, a principle which allows English courts to be ‘more indulgent of fault in a foreign arbitration than to a domestic arbitration’ would be ‘quite unsustainable’, particularly in light of ‘the strongest conceivable public policy against re-opening issues of fact already determined by the arbitrators’.<sup>647</sup> Furthermore, there is a strong policy under the New York Convention that the enforcement court should be less willing than the supervisory court to reopen an award on issues of fact.<sup>648</sup>

Waller LJ (Mantell LJ and Sir David Hirst concurring) agrees with the logic in ‘placing foreign arbitration awards into the same category as domestic arbitration awards and not into the same category as foreign judgments’.<sup>649</sup> He pointed out that the *Abouloff* principle has been weakened by subsequent cases which distinguish it.<sup>650</sup>

The rejection of the *Abouloff* principle led to Colman J’s two-fold requirements for admitting new evidence of illegality (specifically perjury) to reopen a foreign award.<sup>651</sup>

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<sup>644</sup> *Abouloff v Oppenheimer* [1881-5] All ER 307.

<sup>645</sup> *Owens Bank Ltd v Bracro* [1992] 2 All ER 193.

<sup>646</sup> *House of Spring Gardens Ltd v Waite* [1996] 2 All ER 990.

<sup>647</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 782.

<sup>648</sup> *Ibid.*

<sup>649</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 881.

<sup>650</sup> *Ibid.*, 879.

<sup>651</sup> *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 782 and 784.

According to ILA Final Report 247, these conditions are similar to the test laid down by the US court in *Bonar v Dean Witter Reynolds Inc*, 835 F 2d 1378 (11<sup>th</sup> Cir, 1988).

- First, the evidence must be of ‘sufficient cogency and weight to be likely to have materially influenced the arbitrators’ conclusion had it been advanced at the hearing’; and
- Second, the evidence must not be available or reasonably obtainable either at the time of the arbitral hearing; or ‘at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrator’s award if such procedure were available’.

Colman J then added that, if the supervisory court dismisses the application after considering the new evidence, then ‘the public policy of finality would normally require that the English courts should not permit that further evidence to be adduced at the stage of enforcement’.<sup>652</sup>

Yet Colman J’s second requirement is somewhat contentious as it comprises another requirement that ‘local supervisory remedies must be employed’.<sup>653</sup> This means that, if a party is able, but fails to adduce new evidence before the supervisory court, then the enforcement court should disallow any attempt to adduce that evidence before it, ‘however strong the evidence is and even in a case where the evidence could not reasonably be obtained at the time of the arbitration’.<sup>654</sup> This is akin to estoppel by virtue of waiver.

Although Colman J’s additional requirement is primarily based on the need to adequately protect arbitral finality,<sup>655</sup> it nevertheless seems unduly harsh, if not out of step with the judicial approach in other countries.<sup>656</sup> Perhaps this is why Waller LJ prefers to view this additional requirement as one of the balancing factors rather than an inflexible condition, despite his preference not to express a concluded view.<sup>657</sup> This is

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<sup>652</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 784.

<sup>653</sup> *Ibid.*

<sup>654</sup> *Ibid.*, 782-783.

<sup>655</sup> *Ibid.*, 783.

<sup>656</sup> See further discussions in the context of waiver of due process violation in section 6.5.2 of this Chapter.

<sup>657</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, 881.

not surprising, given Waller LJ's willingness to disallow estoppel in exceptional circumstances.

Since the English Court of Appeal agreed with Colman J's remaining requirements, they also agreed with Colman J's decision against admitting the new evidence about perjury. Hence the *Westacre case* exemplifies a strict approach to the admissibility of new evidence in pursuit of the narrow approach to the public policy exception.

**(b) Predictions & recommendations for Australia**

Will Australian courts follow the *Westacre case* in requiring new evidence to reopen an award? The status of the *Abouloff* principle is also uncertain in Australia, at least in the context of reopening foreign judgments on the basis of fraud. The New South Wales Supreme Court in *Keele v Findley* refused to follow *Abouloff* and held that the requirement for new evidence should also apply to foreign judgments, rather than confining it to domestic judgments.<sup>658</sup> Rogers CJ explained that Australian courts should not 'arrogate to themselves the right to re-try an issue determined by the foreign judge', simply on the basis that they may be 'more skilful in detecting perjury than was the foreign judge'.<sup>659</sup> Accordingly, Rogers CJ adopted the requirements enumerated by Kirby P in *Wentworth v Rogers (No 5)* (who was also critical of the *Abouloff case*) – namely, the newly discovered facts must be material and make it reasonably probable that the case of fraud will succeed.<sup>660</sup> These are similar to the requirements in the *Westacre case*, except for Colman J's additional requirement about pursuing local supervisory remedies before raising the new evidence in the enforcement proceedings.

Nevertheless, other judges in the New South Wales Supreme Court have subsequently distinguished and even questioned *Keele v Findley*.<sup>661</sup> Some judges in other Australian

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<sup>658</sup> *Keele v Findley* (1990) 21 NSWLR 444.

<sup>659</sup> *Ibid*, 458.

<sup>660</sup> *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 541. Kirby J now sits on the High Court.

<sup>661</sup> For instance, Graham AJ was prepared to distinguish *Keele v Findley* in *Close v Arnot* (Unreported, Supreme Court of New South Wales, Graham AJ, 21 November 1997).

More significantly, Dunford J in *Yoon v Song* (2000) 158 FLR 295, para 22, was not satisfied that *Keele v Findley* was 'correctly decided': "Notwithstanding the various criticisms that have been made of the *Abouloff* rule, I am satisfied that it correctly states the law in relation to foreign judgments and that if such law is to be changed, it should be by Parliament and not by the Courts."

jurisdictions continue to endorse the *Abouloff* principle.<sup>662</sup> Thus *Keele v Findley* remains a doubtful authority in the absence of any High Court decision.<sup>663</sup>

It is hoped that the Australian High Court will soon resolve this double uncertainty – that is, uncertainty about reopening foreign judgments on the basis of fraud, plus uncertainty about reopening foreign awards on the basis of illegality. The interests of consistency and convenience would support the same approach for both foreign and domestic judgments. The same interests would also support the same approach for both court judgments and arbitral awards, even though the public policy issues raised by the enforcement of foreign judgments and arbitral awards are ‘similar, but not identical’.<sup>664</sup>

As a general rule, new evidence should be required before an Australian court (as the enforcement court) reopens the arbitral finding on illegality. This addresses the concerns relating to arbitral finality and estoppel. Exceptions to this general rule are nevertheless necessary to prevent injustice. Here Waller LJ’s concept of preliminary inquiry may be useful in determining whether to disallow estoppel, and therefore waive the requirement of new evidence in appropriate circumstances. Examples include arbitrator’s bad faith, fraud, and lack of due process or jurisdiction in determining the illegality issue.

Contrary to Colman J’s approach in the *Westacre case*, the parties should not be required to challenge an award before the supervisory court prior to defending themselves in the enforcement proceedings. This is because, apart from the differences in their functions and scope of jurisdiction, the supervisory court and the enforcement court may also differ in their approach to issues of illegality and public policy.<sup>665</sup>

This leads to the following recommendations:

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<sup>662</sup> See, eg, Atkinson J in *De Santis v Russo* [2001] QSC 65, para 16.

<sup>663</sup> Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002); Reid Mortensen, *Private International Law – Butterworths Tutorial Series* (2000) para 18.2.21; Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (2002) 238.

<sup>664</sup> Jonathan Harris and Frank Meisel, ‘Public Policy and the Enforcement of International Arbitration Awards: Controlling the Unruly Horse’ (1998) *Lloyd’s Maritime and Commercial Law Quarterly* 568, 578; Karl-Heinz Bockstiegel, ‘Public Policy and Arbitrability’ in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 177, 179.

<sup>665</sup> See further discussions in section 6.5.2(b) of this Chapter – ‘Failure to object before supervisory court’.

***Recommendation 3: Judicial inquiry into the arbitral decision***

- (a) As a general rule, new evidence of public policy violation is required for judicial reopening or further inquiry into the relevant parts of the arbitral finding. In other words, the relevant party is estopped from adducing the same evidence before the enforcement court.
- (b) However, the enforcement court may waive such requirement (and thereby disallow the other party's claim for estoppel) in the interests of justice or other justifiable circumstances.
- (c) Such justifiable circumstances include the arbitrator's lack of jurisdiction to determine the relevant issues, and the arbitrator's lack of good faith or due process in determining the relevant issues.<sup>666</sup>
- (d) In this regard, the enforcement court may reassess the relevant facts or issues if the alleged public policy violation cannot be determined by a mere review of the award.<sup>667</sup>

***Recommendation 4: Admissibility of evidence of alleged public policy violation***

- (a) If the relevant party did not present evidence of the alleged public policy violation during the arbitral proceedings, the enforcement court may consider whether such party has waived or forfeited the right to present such evidence in the enforcement proceedings.
- (b) Such evidence may be admissible if it was not available or reasonably obtainable at the time of the arbitral proceedings, and if it is likely to have a material effect on the outcome of the arbitral proceedings.

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<sup>666</sup> This is akin to Waller LJ's notion of preliminary inquiry in *Soleimany v Soleimany* [1999] 3 All ER 847 and *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864, which finds Australian support in *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700.

<sup>667</sup> This is a modified version of ILA Resolution Rec 3(c).

## 6.5 CASE STUDY 2: DUE PROCESS

Apart from violation of substantive public policy, violation of procedural public policy can also render an award unenforceable under the public policy exception. The alleged perjury in the *Westacre case* would have been an example had the court admitted the relevant evidence.

The public policy exception in New York Convention Art V(2)(b) overlaps with, and therefore incorporates, the due process exception of Art V(1)(b).<sup>668</sup> This is one of the reasons why it has become ‘fashionable’ for parties to raise due process violations under the public policy exception.<sup>669</sup>

This section addresses four issues concerning the distinction and interaction between Arts V(1)(b) and (2)(b). Firstly, to what extent can due process violations (eg lack of notice, lack of impartiality, and inability to present one’s case) fall within the public policy exception? Secondly, whose laws and public policies can the enforcement court consider when determining whether there is public policy violation by virtue of due process violation? Thirdly, does waiver of due process violation also amount to waiver of public policy violation and therefore preclude both exceptions to enforcement? Finally, in what circumstances would it be appropriate to allow enforcement notwithstanding the establishment of the due process exception or the public policy exception?

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<sup>668</sup> See the earlier discussions in Chapter 5 section 5.4.2 – ‘Article V(2)(b) & (1)(b): Public policy & Due process’.

Article V(1)(b) of the New York Convention states: “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”

IAA s 8(5)(c) uses the similar expression ‘that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings’.

<sup>669</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Mason NPJ).

### 6.5.1 Due process violation may constitute public policy violation

Section 19(b) of the *International Arbitration Act* (IAA) expressly declares that, an award is in conflict with Australian public policy if a breach of the rules of natural justice occurs in connection with the making of that award. In other words, due process violations in the making of an award may lead to public policy violations in the enforcement of that award. However, IAA s 19(b) does not define ‘rules of natural justice’, and its scope depends on the judicial understanding of the due process requirements.<sup>670</sup> Not all due process requirements would qualify as the public policy of Australia.

The French and Swiss courts have held that certain due process requirements are part of their international public policy.<sup>671</sup> Some commentators view Art V(1)(b) as imposing ‘a rather vague international standard of due process’.<sup>672</sup> Other commentators go further and advocate ‘transnational procedural public policy’ or ‘procedural *lex mercatoria*’.<sup>673</sup> For instance, they regard Articles 18 and 19 of the Model Law (which provide for equal treatment of parties and parties’ right to determine procedural rules respectively) as ‘the Magna Carta of arbitral procedure’.<sup>674</sup>

The debate about whether due process requirements fall within international public policy and/or transnational public policy reinforces the overlap between these two categories of public policy, as well as the inappropriateness of excluding transnational public policies from the public policy exception. Rather than participating in this debate, the following sections examine how the judicial approaches may differ,

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<sup>670</sup> Duncan Miller, ‘Public Policy in International Commercial Arbitrations In Australia’ (1993) 9 *Arbitration International* 167, 171.

<sup>671</sup> See further discussions in section 6.5.1(b) of this Chapter – ‘Cases involving both Art V(1)(b) & (2)(b)’.

<sup>672</sup> See, eg, Robert von Mehren, ‘Enforcement of Foreign Arbitral Awards in the United States’ (1998) 1 *International Arbitration Law Review* 198, 200.

<sup>673</sup> See eg, Gabrielle Kaufmann-Kohler, ‘Globalisation of Arbitral Procedure’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, 1322ff; Fernando Mantilla-Serrano, ‘Towards a Transnational Procedural Public Policy’ (2004) *Arbitration International* 333.

<sup>674</sup> Paul Obo Idornigie, ‘Anchoring Commercial Arbitration on Fundamental Principles’ (2004) 23 *The Arbitrator & Mediator* 65, 66.

The Explanatory Notes on the Model Law (UN Doc A/40/17, para 27) specifically states that ‘Art 18 lays down fundamental requirements of procedural justice’.



depending on whether due process violation is raised solely under the due process exception, or whether it is also raised under the public policy exception.

**(a) Cases decided solely on Art V(1)(b)**

Many national courts apply the due process exception of Art V(1)(b) narrowly and strictly against non-enforcement, such as imposing a high standard of proof.<sup>675</sup> Only ‘severe due process violation’ would justify non-enforcement under this exception – ie ‘the violation must flagrantly affect the award in such a way that to enforce it would not only be unfair, but would result in a miscarriage of justice’.<sup>676</sup>

In most of the rare cases in which Art V(1)(b) was successfully invoked, the relevant parties were denied a fair or adequate opportunity to present their case.<sup>677</sup> For instance, in *Iran Aircraft Industries v Avco Corporation* (the *Avco case*), the US Court of Appeals refused enforcement because the arbitral tribunal misled and prevented one party from presenting its case in a meaningful manner.<sup>678</sup>

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<sup>675</sup> See, eg, the famous US case of *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969 (2<sup>nd</sup> Cir, 1974). In that case, the inability to present one witness due to arbitrator's refusal to reschedule the hearings to accommodate that witness did not amount to inability to present one's case.

<sup>676</sup> Elise Wheelless, 'Article V(1)(b) of the New York Convention' (1993) 7 *Emory International Law Review* 805, 814; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 297 and 390; Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (2002) 498.

<sup>677</sup> See the examples in Albert Jan van den Berg, 'Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few' (1999) *ICC International Court of Arbitration Bulletin*, 'Arbitration in the Next Decade' Special Supplement 75, 78: insufficient notice period to attend the arbitral hearing as defendant's place of location was hit by a major earthquake (Court of Appeal, Naples, 18 May 1982, *Bauer & Grabmann OHG v Fratelli Cerrone Alfredo e Raffaele*, reported in *Yearbook Commercial Arbitration X* (1985) 461-462, Italy No. 70); one party not informed of the opposing party's arguments (Court of First Instance, Bremen, 20 January 1983, *Portuguese Company A v Trustee in Bankruptcy of Germany Company X*, reported in *Yearbook Commercial Arbitration XII* (1987) 486-487, Germany No. 28); copies of one party's submissions not given to the other party (Court of Appeal, Amsterdam, 16 July 1992, *G WL Kersten & Co BV v Societe Commerciale Raoul-Duval et Cie*, reported in *Yearbook Commercial Arbitration XIX* (1994) 708-709, Netherlands No. 16).

See also Hanseatisches Oberlandesgericht (Hamburg), 8 November 2001 (CLOUT Case No. 562), in which an award was set aside under the due process exception in Model Law Art 34 because the party was only informed about the constitution of a two-member tribunal, but not of the appointment of the chairman).

<sup>678</sup> *Iran Aircraft Industries v Avco Corporation*, 980 F 2d 141 (2<sup>nd</sup> Cir, 1992). In this case, the arbitral tribunal held a pre-hearing conference to consider appropriate methods for proving Avco's claims which were based on voluminous invoices. The former Chairman of Tribunal said that he would prefer Avco's option of having an external agent to audit and certify the invoices. Avco then proceeded to employ an agent for this purpose. Yet the former Chairman resigned at the time of the arbitral hearing and Avco was challenged upon why the original invoices were not submitted. Avco explained that the method of proof had been agreed in the pre-hearing. However, the arbitral tribunal disallowed Avco's claims. By 2:1, the

Similarly, the Supreme Court of Hong Kong High Court in *Paklito Investment Ltd v Klockner East Asia Ltd* refused enforcement on the basis of ‘serious procedural irregularity’.<sup>679</sup> In that case, a CIETAC<sup>680</sup> award was rendered without responding to the defendants’ request to comment on the reports of the tribunal-appointed experts. Kaplan J considered the due process requirements of both China (the seat of arbitration) and Hong Kong (the place of enforcement).

With respect to Chinese law, Kaplan J acknowledged that, since the parties agreed on CIETAC arbitration, ‘they must be deemed to take Chinese arbitral practices and procedures as they find them’.<sup>681</sup> However, he rejected that Chinese law and arbitral practice disallow cross-examination, stating that the right to comment on the experts’ reports ‘is such a basic right’.<sup>682</sup> Thus the denial of that right was denial of ‘a fair and equal opportunity of being heard’.<sup>683</sup>

This led to Kaplan J’s obiter comment that, in the context of domestic arbitration in Hong Kong, such procedural irregularity would also justify annulment of the award, or removal of arbitrator on the ground of misconduct. He stressed that ‘misconduct’ implies no impropriety on the arbitrators’ part but ‘refers to situations where there has been a serious procedural irregularity’.<sup>684</sup>

Kaplan J then concluded that this is a case in which there is ‘a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, cannot be expected to approve’.<sup>685</sup> This seemingly suggests that the enforcement State’s arbitral rules are relevant under the due process exception of Art V(1)(b), irrespective of whether or not those rules are part of the law governing the arbitral procedure.

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US Court of Appeals upheld the district court’s decision that the arbitral tribunal misled Avco and denied Avco the opportunity to present its claim within the meaning of Art V(1)(b).

<sup>679</sup> *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39.

<sup>680</sup> CIETAC stands for ‘China International Economic and Trade Arbitration Commission’.

<sup>681</sup> *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 47.

<sup>682</sup> *Ibid*, 46

<sup>683</sup> *Ibid*, 47.

<sup>684</sup> *Ibid*.

<sup>685</sup> *Ibid*, 49.

The US court in the *Avco case* also recognised that Art V(1)(b) ‘essentially sanctions the application of the forum state’s standards of due process’.<sup>686</sup> This choice of law issue warrants further examination.

According to the conflict of laws rules of most countries, the law governing the arbitral procedure (known as the ‘*lex arbitri*’) is either the law chosen by the parties, or in the absence of such a choice, the law of the seat of arbitration.<sup>687</sup> This is supported by New York Convention Art V(1)(d), which provides that arbitral procedure which is not in accordance with the parties’ agreement or ‘the law of the country where the arbitration took place’ may lead to non-enforcement of the relevant award. Yet the due process exception of Art V(1)(b) is silent on this choice of law issue.

Despite the continuing debate on ‘which law applies to the interpretation and therefore content of Art V(1)(b)’, there is a general consensus that the enforcement court can be ‘guided by the principles forming the minimum standards of its *lex fori* in its review of the mandatory due process standards under Art V(1)(b)’.<sup>688</sup>

Although the *Paklito case* was decided solely on the due process exception of Art V(1)(b), Kaplan J made an interesting obiter comment on the relationship between Art V(1)(b) and the public policy exception of Art V(2)(b):

“If the defendants do not establish that they were prevented from presenting their case, the question of public policy does not enter the equation. If the defendants established this ground then public policy is irrelevant.”<sup>689</sup>

Kaplan J then reiterated that the public policy exception is ‘construed narrowly’ and that the *Paklito case* did not involve issues of public policy’.<sup>690</sup> Two comments can be made here.

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<sup>686</sup> *Iran Aircraft Industries v Avco Corporation*, 980 F. 2d 141 (2<sup>nd</sup> Cir, 1992), citing *Parsons & Whittemore Overseas Co Inc v Societe Generale de l’Industrie du Papier*, 508 F. 2d 969, 975 (2<sup>nd</sup> Cir, 1974).

<sup>687</sup> Richard Garnett, ‘International Arbitration Law: Progress Towards Harmonisation’ [2002] 3 *Melbourne Journal of International Law* 400, 406; Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 233 and 241. See further discussions in section 6.5.1(b) of this Chapter – ‘Cases involving both Art V(1)(b) & (2)(b)’.

<sup>688</sup> Frank-Bernd Weigand (ed), *Practitioner’s Handbook on International Arbitration* (2002) 494 and 495.

‘*Lex fori*’ means the law of the forum.

<sup>689</sup> *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 50.

<sup>690</sup> *Ibid.*

First, the enforcement court need not consider the public policy exception of Art V(2)(b) if the defendant has successfully established the due process exception of Art V(1)(b). However, this does not necessarily mean that the relevant due process violation does not fall within Art V(2)(b) – it is simply unnecessary for the enforcement court to raise Art V(2)(b) additional to Art V(1)(b) to refuse enforcement.

The second comment is that the defendant's failure to establish the due process exception makes it unlikely for the enforcement court to refuse enforcement under the public policy exception. This is particularly so if the defence is solely based on due process violations – for there would be no public policy violations in the absence of any due process violations.

**(b) Cases involving both Art V(1)(b) & (2)(b)**

Many national courts have also adopted a narrow approach when applying the due process exception of Art V(1)(b) in conjunction with the public policy exception of Art V(2)(b). They would not refuse enforcement under Art V(1)(b) unless there is also violation of the due process requirements of the enforcement State in addition to those of the *lex arbitri* (ie the law governing the arbitral procedure). Nor would they refuse enforcement under Art V(2)(b), unless the due process violation also violates the enforcement State's public policy. For instance, the US courts have consistently rejected arguments based on both Arts V(1)(b) and (2)(b).<sup>691</sup> Some of them treat the two exceptions to enforcement together, stating that the invocation of the public policy exception is 'duplicative' of the defence under the due process exception,<sup>692</sup> and that the due process exception 'essentially sanctions the application of the forum state's standards of due process'.<sup>693</sup> Two observations can be made about the judicial approach to this choice of law issue.

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<sup>691</sup> See, eg, *Biotronik Mess- und Therapiegeräte GmbH & Co v Medford Medical Instrument Co*, 415 F Supp 133 (New Jersey District Court, 1976); *Geotech Lizen ZAG v Evergreen Systems Inc*, 697 F Supp 1248 (SDNY 1988); *Ukrvneshprom State Foreign Economic Enterprise v Tradeway Inc*, Southern District Court of New York, 11 March 1996, extract in Yearbook Commercial Arbitration (US No. 223) <<http://www.kluwerarbitration.com>> at 26 July 2004; *Trans Chemical Ltd v China National Machinery Import & Export Corporation*, 161 F 3d 314 (Texas District Court, 1998).

<sup>692</sup> *Trans Chemical Ltd v China National Machinery Import & Export Corp* 161 F 3d 314 (1998) (US District Court of Texas).

<sup>693</sup> *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 975 (2<sup>nd</sup> Cir, 1974).

First, when considering the due process exception of Art V(1)(b) in conjunction with the public policy exception of Art V(2)(b), the enforcement court may apply its own due process requirements in addition to those of the law governing the arbitral procedure.<sup>694</sup> This is understandable as Art V(2)(b) expressly directs the court to consider the enforcement State's public policy, including due process-related procedural public policies.

Second, even when considering the due process exception of Art V(1)(b) in isolation, several national courts, notably those in the United States and Hong Kong, would still apply their own due process requirements. This is somewhat controversial as Art V(1)(b), unlike Art V(1)(d), is silent on which laws the enforcement court can apply when determining whether the alleged due process violation falls within Art V(1)(b). If, for instance, the CIETAC arbitration in the *Paklito case* violated the due process requirements of either China or Hong Kong (but not both), would the Hong Kong court still refuse to enforce the award?

- Assume there is violation of the foreign due process requirements only (eg Chinese law more stringent than Hong Kong law). Although the due process exception of Art V(1)(b) does not expressly preclude the enforcement court from refusing enforcement on this basis, the pro-enforcement policy of the New York Convention may nevertheless discourage it. The enforcement court is entitled to view this violation as insufficiently serious to justify non-enforcement under the public policy exception of Art V(2)(b). This would be problematic only if the enforcement State's due process requirements are unusually inadequate or unfair.
- Assume the reverse situation where there is violation of the forum's due process requirements only (eg Hong Kong law more stringent than Chinese law). The due process exception of Art V(1)(b) does not expressly preclude enforcement on this basis either.

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<sup>694</sup> See Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (2002) 495; and United Nations Conference on Trade & Development, *Dispute Settlement: International Commercial Arbitration* (Module 5.7 Recognition & Enforcement of Arbitral Awards: The New York Convention), UN Doc UNCTAD/EDM/Misc.232/Add.37 (2003) 30.

However, if the court wishes to refuse enforcement, it may be more appropriate to do so under the public policy exception of Art V(2)(b), lest there are criticisms of the court's paternalistic or chauvinistic approach to Art V(1)(b) in disregarding the *lex arbitri*. Moreover, the public policy exception is wider than the due process exception, and can be raised by the enforcement court *ex officio*.

It is timely to examine the rare cases which expressly or impliedly refused enforcement under the public policy exception because of due process violations. The French courts have held that non-compliance with time limits imposed by the arbitration agreement and lack of arbitrator's impartiality would violate both domestic and international public policy of France.<sup>695</sup> In *Excelsior Film TV v UGC-PH*,<sup>696</sup> the arbitrator created an imbalance between the parties by conveying erroneous information. The French Supreme Court held that the award rendered under such violation of due process violated French public policy.

Similarly, the Swiss courts have held that the arbitrator's impartiality together with the parties' ability to object to serious procedural defects are 'fundamental requirements of legal protection' and therefore pertain to the Swiss public policy.<sup>697</sup> In one case, the arbitrator acted as the lawyer for both parties for years. He drafted an arbitration agreement which named himself as the arbitrator and imposed penalty for removing or changing the arbitrator. The Swiss court held that such restriction on the parties' right to object to serious procedural defects such as lack of impartiality was against *bonos mores* and therefore justified non-enforcement of the award.<sup>698</sup>

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<sup>695</sup> See, eg, *Dubois & Vanderwalle v Boots Frites BV*, Paris Court of Appeal, 22 September 1995, extract in Yearbook Commercial Arbitration (France No. 29, para 3) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>696</sup> *Excelsior Film TV v UGC-PH*, French Supreme Court, 24 March 1998, extract in Yearbook Commercial Arbitration (France No. 30) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>697</sup> *Bezirgericht* (Court of First Instance), 26 May 1994, extract in Yearbook Commercial Arbitration (Switzerland No. 30, paras 18 and 27) <<http://www.kluwerarbitration.com>> at 26 July 2004 (affirmed by Court of Appeal in Zurich on 29 July 1995).

<sup>698</sup> *Ibid*, paras 22 and 27.

'*Bonos mores*' means good morals or public order: ILA Interim Report 235.

Despite the supervisory court's refusal to set aside the award in that case, the Swiss court refused to enforce the award, as it refused to recognise the supervisory court's judgment 'which mocks the fundamental principles of fairness'.<sup>699</sup> This Swiss case therefore demonstrates that an award's recognition in the supervisory State does not guarantee that award's enforcement elsewhere.<sup>700</sup>

(c) *Hebei case: Disagreement between Hong Kong judges*

The Hong Kong judges reached different conclusions in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*, despite their preference for a narrow approach to the public policy exception.<sup>701</sup> Both courts agreed that the test is whether enforcing the award would violate the fundamental conceptions (or the most basic notions) of morality and justice of Hong Kong.<sup>702</sup> In the *Hebei case*, the CIETAC chief arbitrator and tribunal-appointed experts inspected the machinery (which was the subject of the dispute). The defendant and other arbitrators were absent as they were not informed of the inspection. The defendant unsuccessfully applied to the supervisory court in Beijing to set aside the award for breaching the governing arbitral rules. Its challenge to the award's enforcement in Hong Kong under the due process exception also failed at first instance.

Subsequently, the Hong Kong Court of Appeal refused to enforce the award under the public policy exception. It held the defendant's inability to present its case and the chief arbitrator's apparent bias were 'a serious breach of natural justice' – hence it would be contrary to the public policy of Hong Kong to enforce the award.<sup>703</sup>

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<sup>699</sup> Ibid, para 30.

<sup>700</sup> See further discussions in section 6.5.4 of this Chapter – 'Supervisory court's decision against annulment'.

<sup>701</sup> *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12) <<http://www.kluwerarbitration.com>> at 26 July 2004; *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003.

<sup>702</sup> See *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Mason NPJ); *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12, para 38) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>703</sup> *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12, paras 34 and 38) <<http://www.kluwerarbitration.com>> at 26 July 2004.

Despite conflicting evidence, the Hong Kong Court of Appeal concluded that the defendant ‘did not have a proper opportunity to present its case’ after the inspection and the compilation of the experts’ report. This is because the defendant was not informed of the inspection, nor was it privy to the communications between the plaintiff, the chief arbitrator and experts during that inspection. Not all of these communications would be mentioned in the experts’ report and therefore the defendant ‘was kept in the dark’ as to those ‘whispers in the ears’.<sup>704</sup> The Court of Appeal also refused to exercise its discretion to allow enforcement. It held that the plaintiff failed to establish that the due process violations had little or no effect on the outcome of the arbitration.<sup>705</sup>

Yet the Hong Kong Court of Final Appeal unanimously overturned the Court of Appeal’s decision by upholding the award’s enforceability. It rejected the Court of Appeal’s factual findings of due process and public policy violations. According to the Court of Final Appeal:

- First, anything ‘short of actual bias’ did not justify non-enforcement under the public policy exception.<sup>706</sup>
- Second, the defendant merely had ‘a cause for complaint’ which fell short of inability to present its case.<sup>707</sup> The Court of Appeal should not reject the supervisory court’s finding of no breach of the governing arbitral rules.<sup>708</sup>
- Third, the defendant’s failure to promptly object to the due process violations led to its failure to establish the public policy exception.<sup>709</sup>

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<sup>704</sup> Ibid.

<sup>705</sup> Ibid, paras 35 and 46.

<sup>706</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Bokhary J).

<sup>707</sup> Ibid (Bokhary J and Mason NPJ).

<sup>708</sup> Ibid (Litton PJ).

<sup>709</sup> Ibid (Mason NPJ and Litton PJ).

According to Mason NPJ, although the inspection and communications in the defendant’s absence ‘were procedures which in Hong Kong might be considered unacceptable’, however after receiving the experts’ report, the defendant should, but failed to, apply for re-inspection or the removal of the chief arbitrator. The defendant simply ‘proceeded with arbitration as if nothing untoward had happened’ – it engaged in ‘dilatory tactics’ and ‘had no relevant case to present’.



Such failure to make prompt objections may also justify the exercise of the court's 'residual discretion' to enforce the award, even if the defendant were able to establish the public policy exception.<sup>710</sup>

The first reason for enforcement indicates a more stringent test for refusing enforcement because of public policy violation by virtue of arbitrator's lack of impartiality. The Court of Final Appeal seems to require actual bias whereas apparent bias may be sufficient for the Court of Appeal.<sup>711</sup> Bokhary J specifically commented that awards 'which do not meet their domestic standards' (ie awards which are 'made in circumstances where a domestic judgment or award would have to be set aside') may nevertheless be enforceable under the New York Convention, unless the awards are 'so fundamentally offensive' to the enforcement State's notion of justice that the enforcement court 'cannot reasonably be expected to overlook'.<sup>712</sup> Thus Bokhary J's judgment exemplifies the narrow approach to the public policy exception, specifically the application of international public policy.<sup>713</sup>

The second reason for enforcement highlights the judicial disagreement on the extent of the enforcement court's deference to the supervisory court's finding against due process violation (and therefore against public policy violation).<sup>714</sup>

The third reason for enforcement suggests that failure to object promptly may influence the enforcement court's decision at both stages two and three of applying the public policy exception. At stage two, waiver may preclude the defendant from raising the public policy exception, or at least diminish the merits of the defendant's claim. At stage three, waiver may also justify enforcement notwithstanding the defendant's establishment of the public policy exception. The following sections further explore the issues of waiver and discretionary enforcement.

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<sup>710</sup> Ibid (Mason NPJ).

<sup>711</sup> Ibid (Bokhary J). Cf *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12, para 36) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>712</sup> Ibid (Bokhary J).

<sup>713</sup> Kelley Snyder, 'Denial of Enforcement of Chinese Awards on Public Policy Grounds: The View from Hong Kong' (2001-2) 42 *Virginia Journal of International Law* 339, 351.

<sup>714</sup> See further discussions in section 6.5.4 of this Chapter – 'Supervisory court's decision against annulment'.

### 6.5.2 Waiver of due process violation may waive public policy violation

The concept of waiver is well established in both common law and civil law countries. Examples include the equitable doctrine of ‘clean hands’ in Anglo-English law, and the concept of ‘forfeiture’ which reflects the ‘bona fides principle’ in civil law.<sup>715</sup> The rationale is that the parties should rely on the exceptions to enforcement in good faith, which entails making prompt objections before the enforcement proceedings.<sup>716</sup> Such objections may relate to the arbitrator’s lack of impartiality or other due process violations. Accordingly, the enforcement court may be reluctant to consider arguments that ‘were available at the time of the hearing and/or could have been presented to the supervisory court in an application to have the award set aside’.<sup>717</sup> It is thus convenient to discuss two situations separately – failure to object before the arbitrator, followed by failure to object before the supervisory court.

#### (a) *Failure to object before arbitrator*

This is the primary reason for enforcing the award in the *Hebei case*. The defendant in that case failed to promptly raise objections about the improper communications between the plaintiff and the chief arbitrator in its absence.<sup>718</sup>

Similarly, the US Court of Appeals in *AAOT Foreign Economic Association (VO) Technostroy Export v International Development & Trade Services Inc* (the *AAOT case*) held that failure to object to the arbitrator’s corruption and lack of impartiality constituted waiver of the right to make such objections.<sup>719</sup> More significantly, waiver of the right to object may also result in waiver of the right to raise the public policy

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<sup>715</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 251.

<sup>716</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Mason NPJ and Litton PJ).

<sup>717</sup> ILA Interim Report 238.

<sup>718</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Mason NPJ).

<sup>719</sup> *AAOT Foreign Economic Association (VO) Technostroy Export v International Development & Trade Services Inc*, 139 F 3d 980 (2<sup>nd</sup> Cir, 1998).

exception in the enforcement proceedings, if the defendant ‘had knowledge of the facts but remained silent until an adverse award was rendered’.<sup>720</sup>

Judicial recognition that failure to make prompt objections may forfeit the right to object (or at least the right to make those objections) resonates with Model Law Art 4, as well as the arbitral rules of prominent institutions such as the International Chamber of Commerce.<sup>721</sup> It follows that waiver of the right to raise due process objections may preclude the subsequent reliance on the due process exception of Art V(1)(b) to resist enforcement. But should such waiver also preclude reliance on the public policy exception of Art V(2)(b)? Presumably the answer is yes in light of the *AAOT case* and the *Hebei case*, at least if the defendant’s reliance on the public policy exception is based on the due process violation that it has failed to raise promptly. This is yet another dimension of the narrow approach to the public policy exception – namely, the enforcement court may preclude a party from raising the public policy exception on the basis of waiver or estoppel. Such approach also finds support in ILA Resolution Rec 2(c):

“Where a party could have relied on a fundamental principle before the tribunal but failed to do so, it should not be entitled to raise said fundamental principle as a ground for refusing recognition or enforcement of the award.”

This ILA recommendation intends to ‘dissuade unsuccessful parties raising arguments belatedly and solely to frustrate enforcement’.<sup>722</sup> It is limited in three ways.

Firstly, it only applies to failure to raise fundamental principles, thereby excluding the other two categories of international public policy.<sup>723</sup> This may be problematic because certain public policies such as those prohibiting corruption fall within more than one of

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<sup>720</sup> Ibid.

<sup>721</sup> Article 4 of the Model Law is entitled ‘waiver of right to object’ which states: “A party who knows that any provision of [the Model Law] from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance, without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.”

See also ICC Rules of Arbitration Art 33 and UNCITRAL Arbitration Rules Art 30.

<sup>722</sup> ILA Final Report 260.

<sup>723</sup> This is confirmed in ILA Final Report 260: “this Recommendation does not apply to the other two categories of international public policy, namely *lois de police* and international obligations.”

ILA's categories of international public policy.<sup>724</sup> Differentiating treatment on the basis of the ILA's overlapping categories of international public policy risks an unruly application of the public policy exception.

Secondly, ILA Resolution Rec 2(c) is confined to failure to object before the arbitrator. It does not extend to failure to object before the supervisory court because 'this approach was not at present generally accepted'.<sup>725</sup>

Finally, ILA Resolution Rec 2(c) does not apply to parties who were unaware of the applicable public policy or its violation at the time of the arbitral proceedings, or were otherwise prevented from raising them with the arbitrators.<sup>726</sup> This is a sensible protection against applying the narrow approach to the public policy exception at the expense of justice. Not all public policy violations are based on due process violations. It follows that waiver of the right to object to due process violations before the enforcement proceedings does not automatically deny the right to raise public policy violations in the enforcement proceedings.

**(b) *Failure to object before supervisory court***

The courts in England and Hong Kong seem to disagree on the relevance, or at least the significance, of a party's failure to challenge an award before the supervisory court. Some do not regard this factor as relevant in determining whether or not to allow enforcement, while others are willing to rely on this factor to allow enforcement notwithstanding the establishment of an exception to enforcement.

Recall Colman J's notion of pursuing local remedies in the *Westacre case*.<sup>727</sup> Colman J elaborated on this requirement in *Minmetals Germany GMBH v Ferco Steel Ltd*:

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<sup>724</sup> See ILA Resolution Rec 1(e).

<sup>725</sup> ILA Final Report 260.

The next section of this Chapter (ie section 6.5.2(b)) will examine the judicial disagreement on the treatment of the failure to object before the supervisory court.

<sup>726</sup> ILA Final Report 260.

<sup>727</sup> See the earlier discussions in section 6.4.6(a) of this Chapter – '*Westacre case*: Pursuit of local supervisory remedies'.

“If the award is defective or the arbitration is defectively conducted, the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must...be a cardinal policy consideration by an English court considering enforcement of a foreign award.”<sup>728</sup>

It is unclear whether Colman J regards the pursuit of local remedies as a precondition to challenging an award in the enforcement proceedings, or whether he merely regards it as an important factor in determining an award’s enforceability. The former approach seems undesirably rigid and harsh. The latter approach seems more likely, as Colman J provides a helpful list of relevant factors for consideration in cases where both due process and public policy violations are alleged:<sup>729</sup>

- The nature of the due process violation;
- The availability of local remedies;
- Whether the defendant has pursued local remedies;
- If the defendant has not done so, then the reasons for, and the reasonableness of, such omission;
- If the defendant has pursued local remedies, then the supervisory court’s decision on the award’s enforceability or validity.

These factors assist the enforcement court to balance the arguments for and against enforcement, and thereby answer the ultimate question of whether enforcing the award would lead to ‘substantial injustice’.<sup>730</sup> Thus Colman J would agree that preventing and sanctioning injustice are the overriding objectives of both the public policy exception and the pro-enforcement policy.

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<sup>728</sup> *Minmetals Germany GMBH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

<sup>729</sup> *Ibid.*

<sup>730</sup> In the *Minmetals case*, the defendant argued that the CIETAC award was founded on evidence which the arbitrators had obtained through their own investigations. Colman J upheld the lower court’s decision to enforce the award, after concluding that the defendant failed to establish its inability to present its case. The defendant was eventually given an opportunity to ask for disclosure of the evidence and comment on it, but declined to do so. The defendant was not prevented from presenting its case by matters outside its control. Thus enforcing the award would not cause substantial injustice.

On the other hand, the Hong Kong court in the *Paklito case* refused enforcement despite the defendant's failure to apply to the supervisory court for annulment.<sup>731</sup> For Kaplan J, such failure 'is not a factor upon which one should or could rely in relation to the exercise of [the enforcement court's] discretion'.<sup>732</sup> This is because the New York Convention does not require the parties to apply for annulment 'as a condition of opposing enforcement elsewhere'.<sup>733</sup> The parties are free to choose between two remedies – applying to the supervisory court to set aside the award, or waiting to resist that award's enforcement before the enforcement court.<sup>734</sup> The former is 'active challenge' whereas the latter is 'passive challenge'.<sup>735</sup>

Interestingly, the Hong Kong Court of Final Appeal's approach in the *Hebei case* is somewhat in between the approaches of Colman J and Kaplan J. Mason NPJ commented that the defendant's failure to apply for annulment may be an additional ground for allowing enforcement, although it was unnecessary to decide this issue, since the court had already decided to allow enforcement on another basis (ie the defendant's failure to object before the arbitrators).<sup>736</sup> However, Mason NPJ does not go as far as requiring the defendant to apply for annulment as a precondition to challenging enforcement:<sup>737</sup>

“a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting on that ground the enforcement of award in the enforcing court in another jurisdiction. That is because each jurisdiction has its own public policy.”

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<sup>731</sup> *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, as discussed in section 6.5.1(a) of this Chapter.

<sup>732</sup> *Ibid*, 49.

<sup>733</sup> *Ibid*, 48.

<sup>734</sup> *Ibid*, 49.

<sup>735</sup> Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 408.

<sup>736</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003. Mason NPJ continued: “Without going into that question, I should indicate that I would be disposed to answer it in the affirmative.”

<sup>737</sup> *Ibid* (Mason NPJ).

“What I have said does not exclude the possibility that a party may be precluded by his failure to raise a point before the court of the supervisory jurisdiction from raising that point before the court of enforcement. Failure to make such a point may amount to an estoppel or want of bona fides such as to justify the court of enforcement in enforcing an award... Obviously an injustice may arise if an award remains on foot but cannot be enforced on a ground which, if taken, would have resulted in the award being set aside.”

Thus for Mason NPJ, a defendant’s failure to raise due process or public policy violations before the supervisory court may, but does not necessarily, preclude that defendant from subsequently raising those violations before the enforcement court. This is because annulment proceedings and enforcement proceedings are different in nature; the supervisory court and enforcement court differ in their jurisdiction; and most importantly, the supervisory State and the enforcement State have different public policies.<sup>738</sup> Owing to the overriding concern of preventing injustice, Mason NPJ seems willing to allow the defendant to raise due process or public policy violations if the supervisory court would set aside the award on the basis of those violations.

Influenced by the *Hebei case*, ILA Resolution Rec 2(c) only bars public policy claims by virtue of failure to raise those claims before the arbitrator. Furthermore, in spite of the different judicial approaches in England and Hong Kong, cases such as *Minmetals* and *Hebei* at least ‘reflect a scepticism’ and even ‘a presumption against the merits of claims that parties fail to raise in time for arbitrators and [supervisory] courts to remedy’.<sup>739</sup> However, certain complexities in the *Hebei case* demand deeper examination.

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<sup>738</sup> According to the Hong Kong Court of Appeal in *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12, paras 26 and 22) <<http://www.kluwerarbitration.com>> at 26 July 2004, because Hong Kong and China have different concepts of public policy, the defendant’s failure to raise the public policy exception before the supervisory court in China did not estop it from doing so before the enforcement court in Hong Kong.

<sup>739</sup> Kelley Snyder, ‘Denial of Enforcement of Chinese Awards on Public Policy Grounds: The View from Hong Kong’ (2001-2) 42 *Virginia Journal of International Law* 339, 357 and 358.

### 6.5.3 Enforcement notwithstanding violations of due process and/or public policy

Another difference between the Hong Kong Court of Final Appeal and Court of Appeal in the *Hebei case* is that the former was prepared to exercise its ‘residual discretion to decline to refuse enforcement’, even if the defendant could establish the public policy exception.<sup>740</sup>

(a) ***Hebei case: Waiver of public policy violation based on due process violation***

The Hong Kong Court of Final Appeal’s decision in favour of enforcement not only stemmed from the defendant’s failure to object before both the arbitral tribunal and the supervisory court, it was also influenced by two additional factors. First, the supervisory court refused to set aside the award, presumably because the defendant only alleged contravention of the governing arbitral rules. Second, the defence to enforcement was initially based solely on the due process exception, specifically the inability to present one’s case. The defendant subsequently raised the public policy exception before the Hong Kong Court of Appeal in its appeal against the lower court’s decision to enforce the award.<sup>741</sup> In other words, the defendant not only failed to promptly raise due process violations before the enforcement proceedings, but also failed to promptly raise those violations during the enforcement proceedings.

The Hong Kong Court of Appeal opposes enforcement notwithstanding the establishment of the public policy violation, as it embraces the view that such judicial discretion ‘could only come into play in relation to some but not all of the grounds’ for non-enforcement:

“It would be most surprising if the court were to enforce the award even though this would be contrary to public policy. If the court finds that it would be violating the most basic notions of morality and justice to enforce the award, it should not enforce such award.”<sup>742</sup>

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<sup>740</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Mason NPJ).

<sup>741</sup> The defendant did not raise the improper communications between the plaintiff and the chief arbitrator until the Court of Appeal proceedings.

<sup>742</sup> *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in *Yearbook Commercial Arbitration XXIII* (1998, Hong Kong No. 12, para 43) <<http://www.kluwerarbitration.com>> at 26 July 2004. Also at para 46: “it would be wrong in principle to enforce the award if it is contrary to public policy to do so.”



This appears to be a well-balanced approach. If the defendant can establish the public policy exception (in spite of the narrow approach to that exception), then the enforcement court should refuse enforcement. Otherwise an excessively narrow approach to the public policy exception would risk injustice. The Hong Kong Court of Appeal is also likely to endorse the view that public policy violations cannot be waived – in other words, failure to object to public policy violations does not waive the right to raise the public policy exception.<sup>743</sup>

In contrast, Litton PJ in the Hong Kong Court of Final Appeal viewed the defendant's allegation of due process violation under the guise of the public policy exception 'with the utmost suspicion', and was willing to estop the defendant from doing so:

"Estoppel..., does not lie comfortably in the context of enforcing a Convention award... If what is suggested by estoppel is no more than this, that a party invoking [Art V] must act in good faith; that he must not string the claimant along by taking procedure points in contesting the award, and then, when all else has failed, attempts to resist enforcement by taking a public policy point for the first time."<sup>744</sup>

For Mason NPJ, the enforcement court is unlikely to enforce an award notwithstanding public policy violations. However, waiver of public policy violation remains possible, at least where such violation is based on the same due process violation that has been waived:

"It is difficult to imagine that a court would [enforce an award], if enforcement were contrary to public policy, but there is no reason why a court could not do so where, as here, the factual foundation for the public policy ground arises from an alleged non-compliance with the rules governing the arbitration to which the party complaining failed to make a prompt objection, keeping the point up its sleeve, at least when the irregularity might be cured."<sup>745</sup>

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<sup>743</sup> The Paris Court of Appeal also rejected the waiver argument in *SA Compagnie Commerciale Andre' v SA Tradigrain France* (2001) Rev. Arb. 773 (cited in Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 439), stating that the court still had to consider the issue, even where the grounds of public policy were neither invoked nor argued before the arbitral tribunal.

<sup>744</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003.

<sup>745</sup> Ibid. Mason NPJ continued: "Whether one describes [the defendant]'s conduct as giving rise to an estoppel, a breach of the bona fide principle or simply as a breach of the principle that a matter of non-compliance with the governing rules shall be raised promptly in the arbitration is beside the point in this case. On any one of these bases, [the defendant]'s conduct in failing to raise in the arbitration its objection

The peculiar circumstances in the *Hebei case* plausibly justified the Hong Kong Court of Final Appeal's decision in granting enforcement. To the extent that the due process exception of Art V(1)(b) overlaps with the public policy exception of Art V(2)(b), waiver of due process violation may constitute waiver of public policy violation. However, since the public policy exception has a wider scope than the due process exception, and since the public policy exception is already difficult to establish, the enforcement court should refuse enforcement upon the establishment of such exception – at least when the public policy violation is not purely based on the waived due process violation.

**(b) Other bases for discretionary enforcement**

Apart from waiver and estoppel, the enforcement court may also exercise its discretion in favour of enforcement if the due process or public policy violation 'would not affect the outcome of the dispute'.<sup>746</sup> Presumably this is because enforcing the award in these circumstances would not cause injustice. However in the *Paklito case*, Kaplan J found it unnecessary to decide whether this is the only circumstance where the enforcement court can allow enforcement.<sup>747</sup> Here Colman J's list of factors in the *Minmetals case* may assist the enforcement court with deciding whether or not to exercise its discretion in favour of enforcement.<sup>748</sup> Interestingly, Colman J commented that, had the defendant in the *Minmetals case* established either the due process exception or the public policy exception, he 'would not have thought it appropriate' to enforce the award.<sup>749</sup>

Colman J's ultimate test of whether enforcement would lead to substantial injustice ameliorates the intrinsically unpredictable nature of balancing public policies. Despite the New York Convention's public policy paradox, the prevention and sanction of injustice are the overriding concerns of both the public policy exception and the pro-

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arising from the communications to the Chief Arbitrator was such as to justify the court of enforcement in enforcing the award."

<sup>746</sup> See Kaplan J's obiter in *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 49.

See also the Hong Kong Court of Appeal in *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12, paras 35, 44 & 46) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>747</sup> *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 49.

<sup>748</sup> *Minmetals Germany GMBH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315. Section 6.5.2(b) of this Chapter outlines Colman J's factors in the *Minmetals case*.

<sup>749</sup> *Ibid*.

enforcement policy. In this sense, the two apparently competing public policies are in fact compatible. Neither the enforcement nor the non-enforcement of an award should cause injustice. In the rare and unusual circumstances where a public policy violation would not cause injustice, the enforcement court may exercise its discretion in favour of enforcement notwithstanding such public policy violation. The *Hebei case* arguably involved such rare and unusual circumstances.

#### 6.5.4 Supervisory court's decision against annulment

Just as the enforcement court may be reluctant to reopen an arbitral finding against public policy or due process violations because of its respect for arbitral finality and party autonomy, the court may also be reluctant to depart from the same finding by the supervisory court because of its respect for judicial finality and comity. For instance, Colman J stated in the *Minmetals case*:

“In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand.”<sup>750</sup>

Colman J deliberately uses the word ‘normally’ because ‘there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so’.<sup>751</sup>

However, Colman J emphasised that:

“outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated.”<sup>752</sup>

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<sup>750</sup> *Minmetals Germany GMBH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

Colman J continued: “Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction.”

<sup>751</sup> *Ibid.* An example of the ‘exceptional cases’ in which the enforcement court would depart from the supervisory court’s decision is the Swiss case mentioned earlier in section 6.5.1(b) of this Chapter – ie *Bezirgericht* (Court of First Instance), 26 May 1994, extract in *Yearbook Commercial Arbitration* (Switzerland No. 30) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>752</sup> *Minmetals Germany GMBH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

On the other hand, the Hong Kong judges in the *Hebei case* differed in the extent of their deference to the supervisory court's decision. The Hong Kong Court of Appeal disagreed with the supervisory court in Beijing, holding that there was contravention of the governing arbitral rules and therefore due process violation.<sup>753</sup> Yet Litton PJ in the Court of Final Appeal concluded that the Court of Appeal should not reject the supervisory court's finding, since comity demands a 'very strong case' of public policy violation.<sup>754</sup>

Mason NPJ appears less willing than Litton PJ to defer to the supervisory court:<sup>755</sup>

"Under the...[New York] Convention, the primary supervisory function in respect of arbitrators rests with the court of supervisory jurisdiction as distinct from the enforcement court... But this does not mean that the enforcement court will necessarily defer to the court of supervisory jurisdiction."

"The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognises that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced."

Accordingly, the supervisory court's refusal to annul the award (and therefore its recognition of that award's validity) does not preclude the defendant from resisting enforcement of that award in a foreign jurisdiction.<sup>756</sup> The defendant is at least entitled to raise the public policy exception. However in these circumstances, the enforcement court of that foreign jurisdiction may hesitate to deny enforcement under the public policy exception.<sup>757</sup>

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<sup>753</sup> *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12, para 42) <<http://www.kluwarbitration.com>> at 26 July 2004.

<sup>754</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Litton PJ).

<sup>755</sup> *Ibid.*

<sup>756</sup> *Ibid* (Mason NPJ).

<sup>757</sup> *Ibid* (Litton PJ).

The UNCITRAL Working Group on Arbitration has designated the ‘residual discretionary power to grant enforcement’ as one of its future work topics.<sup>758</sup> Its progress on this topic is eagerly anticipated.

### 6.5.5 Predictions & recommendations for Australia

Pursuant to s 19 of the *International Arbitration Act 1974* (Cth), Australian courts would regard due process violations as falling within the public policy exception in IAA s 8(7)(b), which is the Australian equivalent of New York Convention Art V(2)(b). Although IAA s 19 confines itself to the public policy exceptions in the Model Law (ie Arts 34(2)(b)(ii) and 36(1)(b)(ii)), it is nevertheless desirable to extend its application to the public policy exceptions in IAA s 8(7)(b) and New York Convention Art V(2)(b).<sup>759</sup> A consistent approach to the public policy exceptions in all three legislative instruments is a step towards preventing an unruly application of the public policy exception.

#### (a) *Joint application of the public policy & due process exceptions*

If a party raises both Arts V(1)(b) and V(2)(b) (or IAA ss 8(5)(c) and (7)(b)), then that party bears the onus of establishing either or both of these exceptions to enforcement.<sup>760</sup> Despite the overlap between the public policy exception and the due process exception, Australian courts should refrain from treating them together, unless they are based on the same factual foundations (ie public policy violation by virtue of due process violation, or due process violation under the guise of public policy).

Furthermore, the establishment of one of these exceptions should suffice to justify non-enforcement. This is because due process and public policy are separate and independent exceptions. They are similar but not identical.

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<sup>758</sup> See *Report of the Working Group on Arbitration on the Work of its 32<sup>nd</sup> Session*, UN GA, 33<sup>rd</sup> session, UN Doc A/CN.9/468 (10 April 2000) para 109(i).

<sup>759</sup> Section 7.2 of Chapter 7 will examine whether Australian courts should adopt the same approach to the public policy exceptions in both enforcement and annulment proceedings. Unlike New York Convention Art V and Model Law Art 36, Model Law Art 34 concerns annulment rather than enforcement of awards.

<sup>760</sup> *Minmetals Germany GMBH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315; *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Mason NPJ).

When applying the due process exception (ie New York Convention Art V(1)(b) and IAA s 8(5)(c)), the focus should be on the due process requirements of the *lex arbitri*.<sup>761</sup> Accordingly, Australian courts may refuse enforcement under this exception, if the violation of the due process requirements of the *lex arbitri* has affected the outcome of the arbitration so as to make it unjust to enforce the award. Neither the New York Convention nor the IAA requires violation of the due process requirements of both the *lex arbitri* and *lex fori*.<sup>762</sup>

By contrast, when applying the public policy exception (ie New York Convention Art V(2)(b) and IAA s 8(7)(b)), the focus shifts to the due process requirements of the enforcement State – ie the Australian jurisdiction in which the award is sought to be enforced. Accordingly, non-enforcement under this exception requires violation of an Australian public policy, such as violation of the due process requirements of both the foreign *lex arbitri* and the Australian *lex fori*.

A more controversial basis for non-enforcement under the public policy exception is that there is no due process violation under the *lex arbitri*, however Australian law regards it as a serious due process violation which renders the award unenforceable in Australia. In this context, it is useful to consider whether similar procedural irregularities have led to annulment by Australian courts, and/or non-enforcement by foreign courts.

Like Hong Kong,<sup>763</sup> the word ‘misconduct’ in Australia includes the arbitrator’s due process violation.<sup>764</sup> Australian cases concerning the annulment of domestic awards on the basis of the arbitrator’s misconduct under the *Commercial Arbitration Act* (CAA) may therefore be useful.<sup>765</sup> Certain domestic standards are also applicable to foreign awards, at least to the extent of the overlap between domestic and international public

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<sup>761</sup> ‘*Lex arbitri*’ is the law chosen by the parties to govern the arbitral procedure, or the law of the seat of arbitration in the absence of parties’ choice.

<sup>762</sup> In this context, the ‘*lex fori*’ is the law of the enforcement State.

<sup>763</sup> See, eg, the *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39.

<sup>764</sup> Section 4 of the *Commercial Arbitration Act* (CAA) defines ‘misconduct’ as including corruption, fraud, impartiality, bias and breach of rules of natural justice.

<sup>765</sup> For cases concerning CAA s 42, see *Australian Foods v Pars Ram* [2002] NSWSC 1180, para 53; *Mond & Mond v Berger* [2004] VSC 45, paras 75 and 77; *Bercon v Ripa* [2004] NSWSC 838, para 25.

policies. Yet the narrow approach to the public policy exception may encourage Australian courts to look beyond Australian cases.

It is also useful to examine the due process requirements of nations other than the seat of arbitration,<sup>766</sup> even though public policy differs from place to place. This would assist Australian courts with determining whether the particular due process requirement is sufficiently fundamental to justify non-enforcement. Refusing enforcement on the basis of violating any Australian due process requirement would be an inappropriate departure from the narrow approach to the public policy exception.

It is likely that due process violations would either fall within or outside both the due process exception and the public policy exception. This is because the ultimate test is the same for both exceptions – namely, whether the alleged violations make it unjust or otherwise acceptable to enforce the awards in Australia.

However, consider the unlikely situation in which the party raises the due process exception without raising the public policy exception, and in which there is no violation of the due process requirements of the *lex arbitri*. The Australian enforcement court in this situation may conclude that the party fails to establish the due process exception. However, before proceeding to allow enforcement, the Australian court can still consider whether the same conduct may nevertheless violate the Australian due process requirements, and thereby render the award's enforcement contrary to Australian public policy. Such *ex officio* examination of the public policy exception is appropriate where the due process requirements of the *lex arbitri* are unusually inadequate or unfair.

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<sup>766</sup> See Bokhary PJ in *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003: "When deciding..., whether to enforce a Convention award made in circumstances where a domestic judgment or award would have to be set aside, it is appropriate to examine how far the courts of other Convention jurisdiction have been prepared to go in enforcing Convention awards made in circumstances which do not meet their domestic standards."

Similarly, ILA Resolution Rec 2(b) encourages Australian courts to take into account 'the existence or otherwise of a consensus within the international community as regards the [due process] principle under consideration'.

**(b) Waiver, estoppel & discretionary enforcement**

Since the equitable doctrine of clean hands is inherent in any discretionary remedies, Australian courts are likely to use waiver and estoppel to allow enforcement notwithstanding the establishment of the public policy exception. However, Australian courts should do so sparingly and cautiously. This leads to the following recommendations:

- Waiver should be a balancing factor, rather than an absolute ground for precluding a party from raising due process or public policy violations.
- Failure to raise due process violations before the enforcement proceedings should not preclude the subsequent reliance on the public policy exception in the enforcement proceedings, at least if the alleged public policy violations are not purely or solely based on due process violations.
- Waiver should be confined to failure to make prompt objections before the arbitrator.<sup>767</sup>
- If a defendant has otherwise established the public policy exception, the court should refrain from allowing enforcement on the basis of waiver or estoppel, unless that defendant's failure to make prompt objections before the enforcement proceedings is unjustifiable or unreasonable.

In this regard, should the defendant bear the onus of disproving unreasonableness (or proving reasonableness) of its conduct? Or should the plaintiff bear the onus of proving the unreasonableness of the defendant's conduct? The former approach appears more convenient, since it is part of the defendant's onus to establish the public policy exception. It also appears more consistent with the narrow approach to the public policy exception. Yet it is equally arguable that the plaintiff should bear the onus of proof when requesting enforcement in spite of the defendant's establishment of the public policy exception.

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<sup>767</sup> ILA Resolution Rec 2(c) seems to prefer the approach in the *Hebei case* over the approach in the *Minmetals case*.



In all circumstances, Australian courts should not exercise their discretion in favour of enforcement if to do so would undermine justice, integrity or faith in arbitration. The pro-enforcement policy of the New York Convention should not extend to the enforcement of awards which are ‘perverse and prejudiced’<sup>768</sup> or otherwise unjust. Here Australian courts may consider the seriousness of the public policy or due process violations; the effect of such violation on the outcome of the arbitral dispute (and the extent of such effect); as well as the consequences of enforcing the award. Like the Hong Kong Court of Appeal in the *Hebei case*,<sup>769</sup> Australian courts may impose the onus on the plaintiff to establish that the relevant violations have no or little effect on the outcome of the arbitration.

While the applicability of the proportionality principle remains unsettled in Australia, the balancing act involved in exercising the discretion to allow or refuse enforcement resembles, and is capable of incorporating, the proportionality principle. Non-enforcement of an award should not be disproportionate to the seriousness of the public policy violation resulting from that award’s enforcement.

It is hoped that the following recommendations will be a useful starting point for the Australian judiciary.

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<sup>768</sup> ILA Interim Report 253.

<sup>769</sup> *Polytek Engineering Co. Ltd v Hebei Import & Export Corp*, Hong Kong Court of Appeal, 16 January 1998, extract in Yearbook Commercial Arbitration XXIII (1998, Hong Kong No. 12, para 46) <<http://www.kluwerarbitration.com>> at 26 July 2004.

***Recommendation 5: Public policy exception & due process exception***

- (a) Where the relevant party raises the due process exception (ie IAA s 8(5)(c), New York Convention Art V(1)(b) or Model Law Art 36(1)(a)(ii)) together with the public policy exception (ie IAA s 8(7)(b), New York Convention Art V(2)(b) or Model Law Art 36(1)(b)(ii)), the enforcement court may refuse enforcement under either or both of these exceptions. The enforcement court may do so if: (i) the award contravenes any due process requirements of the law governing the arbitral procedure, or any mandatory rules of public policy; and (ii) such contravention has a material effect on the outcome of the arbitration.
- (b) Where the relevant party raises the due process exception without raising the public policy exception, the enforcement court may consider the public policy exception *ex officio* when determining whether or not to enforce the award.
- (c) A party's failure to raise due process violation before the enforcement proceedings should not preclude that party's subsequent reliance on the public policy exception in the enforcement proceedings, at least where the alleged public policy violation is not solely based on the alleged due process violation.

***Recommendation 6: Discretionary enforcement – the general rule***

If the enforcement court finds, either upon the party's proof or its own motion, that to enforce the award would be contrary to mandatory rules of public policy, then it should refuse to enforce the award unless such refusal would cause substantial injustice.

***Recommendation 7: Discretionary enforcement – waiver or estoppel as an exception to the general rule***

- (a) The enforcement court should refrain from allowing enforcement of the award on the basis of waiver or estoppel, unless the relevant party's failure to raise the alleged public policy violation before the arbitrator is unjustifiable or unreasonable.
- (b) The relevant party's mere failure to challenge the arbitral award in the supervisory State (or any other country) may not justify the discretionary enforcement of the award notwithstanding the public policy exception.

## 6.6 OTHER ISSUES IN APPLYING THE PUBLIC POLICY EXCEPTION

Chapter 5 demonstrates the need to interpret the public policy exception in light of the discretionary and exhaustive nature of New York Convention Art V, as well as the overlap between the various exceptions to enforcement. These features raise challenging questions for applying the public policy exception in the enforcement proceedings.

The first question concerns the *ex officio* nature of the public policy exception – namely, in what circumstances should the enforcement court raise the public policy exception by their own volition?

The second question concerns the discretionary nature of the exceptions to enforcement in Art V – namely, can an award be severable and therefore partially enforceable?

The third question revisits the potential threat to the exhaustive nature of Art V. If there is a ‘residual discretion’ to allow enforcement notwithstanding the establishment of an exception to enforcement, then is there a ‘general discretion’ to refuse enforcement notwithstanding the non-establishment of any exception to enforcement?

### 6.6.1 *Ex officio* consideration of public policy

Unlike other exceptions to enforcement in Art V (except for arbitrability), the enforcement court can raise the public policy exception on its own motion.<sup>770</sup> Such *ex officio* consideration may be appropriate in the following situations. These are by no means exhaustive. The enforcement court should consider the public policy exception if it considers that its failure to do so may risk injustice.

For instance, if the alleged public policy does not fall within the public policy exception at stage one in the application of the public policy exception, then the enforcement court may consider any other potentially applicable public policies before proceeding to enforce the award. Another example is where the relevant party fails to establish the alleged public policy violation at stage two in the application of the public policy exception. Here the enforcement court may do the same before proceeding to enforce the award.

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<sup>770</sup> See the earlier discussions in Chapter 5 section 5.3.1 – ‘Article V(1) vs V(2): Parties’ challenge vs Judges’ own motion’.

**(a) Uncontested enforcement proceedings**

The first situation is where the defendants do not participate in the enforcement proceedings. In this situation, the US courts have considered both the public policy exception and the arbitrability exception in Art V(2) before allowing enforcement.<sup>771</sup>

**(b) Illegality, arbitrability & public policy**

The similarity and overlap between the arbitrability exception of Art V(2)(a) and the public policy exception of Art V(2)(b) suggest that the enforcement court may consider the public policy exception in situations where the party raises the arbitrability exception, or otherwise raises issues of arbitrability.<sup>772</sup> For instance, when determining whether to reopen an arbitral finding on illegality, the English courts would consider the preliminary question of whether the alleged illegality is arbitrable.<sup>773</sup>

This is where Waller J's concept of preliminary inquiry may be useful, especially for ascertaining whether the arbitrator has decided the illegality issue in breach of due process or procedural public policy.<sup>774</sup>

**(c) Due process & public policy**

The overlap between the due process exception of Art V(1)(b) and the public policy exception of Art V(2)(b) presents the third situation for *ex officio* examination of public policy. As one commentator suggests:

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<sup>771</sup> See, eg, the New York District Court decisions in *Seven Seas Shipping (UK) Ltd v Tondo Limitada*, Southern District Court of New York (1999), extract in Yearbook Commercial Arbitration (US No. 318) <<http://www.kluwerarbitration.com>> at 26 July 2004; and in *Stellar Lines S.A. v Euroleader Shipping & Trading Corp*, Southern District Court of New York (16 August 1999), extract in Yearbook Commercial Arbitration (US No. 322) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>772</sup> For a brief discussion on the overlap between the arbitrability exception and the public policy exception in Art V(2), see Chapter 5 section 5.4.1.

<sup>773</sup> See *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 758 & 767 (Colman J) and *Soleimany v Soleimany* [1999] 3 All ER 847, 857 (Waller LJ), as discussed earlier in section 6.4.4(a) of this Chapter.

<sup>774</sup> See the earlier discussions in section 6.4.4(a) of this Chapter – ‘*Westacre case*: Preliminary inquiry before estoppel’.

“On the procedural side, it is difficult to imagine a public policy concern that a court would raise that would not fit into one of the categories covered by the grounds of Art V(1)(b)... However, one could think of due process violation so egregious (eg a procedure that prevents a party from submitting any evidence whatsoever) that although waived or even expressly accepted by a party, the court would raise such a violation *sua sponte*, under Art V(2)(b).”<sup>775</sup>

According to the above passage, the enforcement court may consider the public policy exception if a party has waived due process violation by failing to object, or otherwise by accepting the violation. Indeed, waiver of due process violations should not automatically constitute waiver of public policy violations.<sup>776</sup>

Another possible (albeit unusual) situation is where a defendant raises the due process exception without raising the public policy exception, and where there is no breach of the law governing the arbitral procedure, but a possible breach of the enforcement State’s due process requirements.<sup>777</sup>

#### **(d) Foreign annulment or non-enforcement**

Section 7.3 of Chapter 7 examines whether and how the enforcement court can consider the public policy exception where a party raises the annulment exception of Art V(1)(e) after an award has been set aside in the supervisory State.

On the other hand, the enforcement court may also raise the public policy exception *ex officio* if the supervisory court or another foreign court has refused to enforce the award under the public policy exception, or otherwise for public policy reasons. The enforcement State’s public policies may be both different from, and comparable to, those of the foreign State. If the court in that foreign State has denied enforcement notwithstanding its narrow approach to the public policy exception, then the court of the enforcement State should at least consider its own public policies before allowing enforcement.

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<sup>775</sup> Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy' (2004) *Arbitration International* 333.

<sup>776</sup> See the earlier discussions in section 6.5.2 of this Chapter – ‘Waiver of due process violation may waive public policy violation’.

<sup>777</sup> See the earlier discussions in sections 6.5.1(a) (‘Cases decided solely on Art V(1)(b)’) and 6.5.5(a) (‘Joint application of the public policy & due process exceptions’).

Thus it has been suggested that, the more the public policy ‘represents a transnational or at least a commonly recognised value’, the more an *ex officio* application of the public policy exception is justified.<sup>778</sup>

***Recommendation 8: Ex officio consideration of public policy***

The enforcement court may, in appropriate circumstances, consider whether the enforcement of an award would be contrary to mandatory rules of public policy on its own motion. Such circumstances include the following:

- (a) The enforcement proceedings are uncontested.
- (b) The arbitrability exception (ie IAA s 8(7)(a), New York Convention Art V(2)(a) or Model Law Art 36(1)(b)(i)) is raised by the relevant party or by the enforcement court *ex officio*.
- (c) The due process exception (ie IAA s 8(5)(c), New York Convention Art V(1)(b) or Model Law Art 36(1)(a)(ii)) is raised by the relevant party. (See also Recommendation 5.<sup>779</sup>)
- (d) The relevant party raises the annulment exception (ie IAA s 8(5)(f), New York Convention Art V(1)(e) or Model Law Art 36(1)(a)(v)), or submits that the award has been set aside or refused enforcement elsewhere. (See also Recommendation 10.<sup>780</sup>)

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<sup>778</sup> Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 *American Review of International Arbitration* 319.

<sup>779</sup> For Recommendation 5, see section 6.5.5 of this Chapter – 'Predictions & recommendations for Australia'.

<sup>780</sup> For Recommendation 10, see section 7.4.2 of Chapter 7 – 'Harmonising judicial approaches to determining the enforceability of annulled awards'.

### 6.6.2 Severance & partial enforcement

If only a part of an award falls within the public policy exception (ie ‘the offending part’), then, provided that the offending part is severable, the enforcement court can still enforce the non-offending remainder of that award. The US courts have allowed such partial enforcement.<sup>781</sup> The Hong Kong courts have also relied on these US decisions in support of the severance principle, including Kaplan J’s decision in *JJ Agro Industries Ltd v Texuna International Ltd*.<sup>782</sup>

Interestingly, Kaplan J was prepared to extend the specific reference to severance in New York Convention Art V(1)(c) to the public policy exception of Art V(2)(b). He would read the public policy exception as ‘contrary to public policy to enforce a severable part of the award’.<sup>783</sup> In other words, the absence of any specific reference to severance in the public policy exception does not preclude the application of the severance principle to that exception. The Victorian courts in *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (the *IMG case*)<sup>784</sup> endorse this interpretation. This is in spite of the somewhat unusual implementation of Art V(1)(c) in IAA. Instead of providing for severance in the exception itself (ie IAA s 8(5)(d) as the Australian equivalent of New York Convention Art V(1)(c)), IAA s 8(6) separately provides for severance in the context of s 8(5)(d).<sup>785</sup>

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<sup>781</sup> In *Laminoris-Trefileries-Cableries de Lens S.A. v Southwire Company*, 484 F Supp 1063 (1980), the US District Court in Georgia only refused enforcement of the additional interest imposed in violation of the US public policy against punitive damages. This was followed by the New York District Court in *Brandeis Intsel Ltd v Calabrian Chemicals Corp*, 656 F Supp 160 (1987).

<sup>782</sup> *JJ Agro Industries Ltd v Texuna International Ltd* [1992] 2 HKLR 391 (Supreme Court of Hong Kong High Court).

<sup>783</sup> Art V(1)(c) concerns matters which are ‘not contemplated by or not falling within the terms of the submission to arbitration’ or ‘are beyond the scope of the submission to arbitration’. The specific reference to severance reads: “if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised or enforced.”

<sup>784</sup> *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (Unreported, Supreme Court of Victoria, Mahony M, 7 July 1995); *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (1995) 128 FLR 458 paras 22-23 (Smith J); *ACN 006397413 Pty Ltd v International Movie Group (Canada) Inc & Movie Group Inc* [1997] 2 VR 31 (Victorian Court of Appeal) para 30.

<sup>785</sup> IAA s 8(6) reads: “Where an award to which [s 8(5)(d)] applies contains decisions on matters submitted to arbitration to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.”

The exceptions to enforcement in IAA s 8(5) are ‘subject to’ the severance provision of s 8(6), although the public policy exception and the arbitrability exception in s 8(7) are not expressly subject to s 8(6).

In the *IMG case*, the Victorian Supreme Court concluded that the existence of IAA s 8(6) ‘would not lead to the exclusion of other bases for severing an award’ – the court can sever an award ‘if the justice of the remainder will not thereby be compromised’.<sup>786</sup> The Victorian Supreme Court also rejected the argument based on ‘the *expressio unius* principle of statutory interpretation’ – that severance is possible only when IAA s 8(5)(d) applies because of the express and specific reference to severance in s 8(6).<sup>787</sup> In addition, the Victorian courts would allow severance under the public policy exception by analogy with the common law principle which permits severing parts of an award that are void for uncertainty.<sup>788</sup>

Consequently, Australian courts are likely to adopt ILA Resolution Rec 1(h), which expressly provides for severance and partial enforcement under the public policy exception:

“If any part of the award which violates international public policy can be separated from any part which does not, that part which does not violate international public policy may be recognised or enforced.”

Indeed, apart from the common law doctrine of severability and the implications of Art V(1)(c), the discretionary nature of Art V permits separating the enforceable part from the unenforceable part of an award. Thus the Australian judiciary may consider adopting the following recommendation.

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CAA s 4(2) also allows an Australian Supreme Court to ‘set aside that part of the award if it can do so without materially affecting the remaining part of the award’.

<sup>786</sup> *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (Unreported, Supreme Court of Victoria, Mahony M, 7 July 1995) paras 85 and 86.

<sup>787</sup> *ACN 006397413 Pty Ltd v International Movie Group (Canada) Inc & Movie Group Inc* [1997] 2 VR 31, para 33.

<sup>788</sup> *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (1995) 128 FLR 458, para 16; *ACN 006397413 Pty Ltd v International Movie Group (Canada) Inc & Movie Group Inc* [1997] 2 VR 31, para 30.

In the *IMG case*, the plaintiff applied under Victoria’s CAA s 33 for leave to enforce a Californian award ‘in the same manner as a judgment or order of the court to the same effect’. In response, the defendant applied to refuse enforcement of that award under IAA s 8, including the public policy exception. Both the Victorian Supreme Court (at paras 28-29) and the Court of Appeal (at para 30) rejected the plaintiff’s argument that severance and partial enforcement of the award would amount to variation of the award and therefore beyond the court’s power under CAA s 33.



***Recommendation 9: Partial enforcement of arbitral award***

If the enforcement of only a part of an award would contravene mandatory rules of public policy (ie the ‘offending part’), then the enforcement court may enforce the remainder of the award (ie the ‘non-offending part’), provided that: (i) the offending part is severable from the non-offending part; and (ii) such partial enforcement would not cause any substantial injustice.

### **6.6.3 Discretion to refuse enforcement?**

In *Resort Condominiums International Inc v Bolwell*, Lee J of the Queensland Supreme Court concluded that there is a general or residual discretion to refuse enforcement ‘quite apart from the specific [exceptions to enforcement]’.<sup>789</sup> This is the reverse of the proposition that there is a residual discretion to enforce an award despite the establishment of an exception to enforcement. It is thus contrary to the prevailing view that Art V is exhaustive. Several comments can be made without fully revisiting the debate.

Firstly, Australian courts are unlikely to refuse enforcement for reasons other than those stipulated in Art V. This is in spite of the textual differences between New York Convention Art V and IAA s 8, specifically the omission of the word ‘if’ from s 8(5), which is the Australian version of Art V(1).

However, the Australian position remains uncertain until a higher court comments on the correctness of the *Resort Condominiums case*.

The Victorian Court of Appeal in the *IMG case* found it unnecessary to do so, because of its decision to sever the uncertain parts of an award and allow enforcement of the remainder.<sup>790</sup> It did not explore whether an award’s uncertainty may be another ground for non-enforcement, or a basis for exercising the discretion against enforcement.

<sup>789</sup> *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406, 426-427, as discussed in Chapter 5 section 5.3.3(a).

<sup>790</sup> *ACN 006397413 Pty Ltd v International Movie Group (Canada) Inc & Movie Group Inc* [1997] 2 VR 31, para 32. In that case, the plaintiff’s counsel conceded that IAA s 8 ‘left open to the [defendant] to argue that the award should not be enforced because of its uncertainty’. The Court of Appeal was ‘content to act on [such] concession without considering its correctness’.

In the *Corvetina* case, the New South Wales Supreme Court also refrained from expressing a ‘concluded view’ on whether there is a general discretion to refuse enforcement.<sup>791</sup>

Finally, it is possible for the enforcement court to exercise its discretion against enforcement under the guise of a liberal approach to the public policy exception. Such an approach again departs from the currently prevailing narrow approach to the public policy exception, although it is arguably less culpable than refusing enforcement for reasons other than the prescribed exceptions to enforcement. The Indian Supreme Court has indeed broadened its approach to the public policy exception, albeit in the context of the annulment proceedings, as the next Chapter will explore.<sup>792</sup>

## 6.7 CONCLUSIONS

Public policy is an exception to the pro-enforcement policy. It is also an exception to the policy against merits review. Owing to the narrow approach to the public policy exception, the illegality of an underlying contract does not necessarily affect the enforceability of an award based on that contract. Similarly, not all procedural irregularities constitute due process or public policy violations and thereby render an award unenforceable.

### 6.7.1 Balancing public policies when applying the public policy exception

The analysis of cases concerning illegality (as an example of substantive public policy) and due process (as an example of procedural public policy) reveals recurring themes.

The first is that the enforcement court may consider the public policies of other countries, even though the public policy exception refers to the enforcement State only.

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The Victorian Supreme Court also referred to ‘an overriding discretion to refuse to enforce the award deriving from s 8 of IAA’ without further comments: see *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (1995) 128 FLR 458, para 33.

<sup>791</sup> *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700, para 10. Section 6.4.4(b) of this Chapter explores the other implications of this case.

<sup>792</sup> See Chapter 7 section 7.2.2(b) – ‘Arbitrator’s disregard or error of law: The Indian approach’.

- In determining the enforceability of an award which purports to enforce an allegedly illegal contract, the enforcement court may consider the public policies of that contract's place of performance or place of the proper law.
- In cases involving alleged due process violations, the enforcement court may consider the public policies of the place whose law governs the arbitral procedure.

Contrary to the concern that such consideration beyond the enforcement State's public policies may widen the scope of the public policy exception, many enforcement courts have in fact done so in their pursuit of the narrow approach to the public policy exception. In other words, they have done so in order to reduce, rather than increase, the likelihood of establishing the public policy exception.

Other recurring themes are waiver by virtue of failure to make prompt objections before the enforcement proceedings, and estoppel by virtue of the arbitrator or supervisory court's finding against public policy violations. Waiver and estoppel can either preclude a party from raising the public policy exception, or prompt the enforcement court to allow enforcement despite that party's establishment of the public policy exception.

- Party's failure to make prompt objections before the arbitrator: In upholding the principles of good faith and clean hands, the enforcement court would consider whether such failure is unjustifiable or unreasonable, and whether the relevant objections would affect the outcome of the arbitration.
- Party's failure to make prompt objections before the supervisory court: Here the enforcement court may consider additional factors such as the availability of remedies in the supervisory State, and whether the supervisory State and enforcement State have different public policies.
- Arbitrator's rejection of party's objections: Due to the policies in favour of arbitral finality, minimal merits review and judicial non-interference, the enforcement court may be reluctant to reopen the arbitrator's finding against the party's objections. For instance, the court may decline to conduct any inquiry in the absence of new and admissible evidence.
- Supervisory court's rejection of party's objections: The enforcement court may be similarly reluctant to depart from the supervisory court's decision in the interests of judicial finality and comity.

However, these apparently competing public policies share, or defer to, the overriding objectives of preventing and sanctioning injustice. The public policy against illegality is more concerned with the protection of public justice or juridical interests (eg no impairment of the interests of third parties or the public at large), whereas due process is more concerned with the protection of private justice (eg fair and just resolution of the arbitral disputes). Accordingly, some judges recognise that there are exceptional circumstances where the enforcement court would not use waiver or estoppel to preclude or otherwise disregard the applicability of the public policy exception.<sup>793</sup>

### **6.7.2 An alternative perception of the public policy paradox**

The public policy paradox of the New York Convention need not be a paradox. The public policy exception and the pro-enforcement policy are not incompatible public policies. They submit to the interests of preserving justice, integrity and faith in arbitration, even though they serve apparently incompatible interests. A successful system of arbitration does not simply mean speedy and world-wide enforcement of arbitral awards. It also means that, at some point, someone (be it the arbitrator, supervisory court or enforcement court), will identify and rectify any injustice. Appropriate non-enforcement of awards enhances, rather than diminishes, public confidence in arbitration.<sup>794</sup>

The narrow approach to the public policy exception ensures that the parties to arbitration do not unjustifiably use the public policy exception to resist or delay the enforcement of awards. Despite the somewhat unruly application of this narrow approach, the cases examined in this Chapter do not exhibit any unjust results. This is because the courts in those cases have been mindful of the overriding objectives that neither enforcement nor non-enforcement of an award should cause or condone injustice.

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<sup>793</sup> See, eg, Waller J in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 All ER 864; Kaplan J in *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39; Mason NPJ in *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003.

<sup>794</sup> Quentin Tannock, 'Judging the Effectiveness of Arbitration Through the Assessment of Compliance with and Enforcement of International Arbitration Awards' (2004) 21 *Arbitration International* 71, 84-85.

## CHAPTER 7

### CHASING THE UNRULY HORSE – PUBLIC POLICY & ANNULMENT OF ARBITRAL AWARDS

#### 7.1 INTRODUCTION

“Awards are very rarely annulled. Moreover, awards which are not satisfied voluntarily are usually granted judicial recognition and enforcement. The challenges encountered in the enforcement process tend to be practical..., rather than legal. Then why bother thinking about new legal solutions when there is no pressing legal problem?..... the text of the New York Convention is outdated in some salient respects. There is clearly room for some improvements which would reduce the risk of unnecessary litigation. (For even if awards are almost always upheld, the debates about applications for annulment and enforcement are frequently costly and sterile).”<sup>795</sup>

A thesis on the public policy exception to the enforcement of arbitral awards should address certain annulment-related issues. This is because public policy is also a ground for annulment under Model Law Art 34(2)(b)(ii) (which is known as ‘the public policy ground for annulment’), while annulment is a ground for non-enforcement under New York Convention Art V(1)(e) (which is known as ‘the annulment exception to enforcement’). The interaction between annulment and enforcement of arbitral awards is where the unruly horse of public policy is most likely to go astray, and even ‘wreak havoc’.<sup>796</sup> It represents additional tensions relating to the New York Convention’s public policy paradox:

“The New York Convention is...characterized by fundamental underlying tensions. These include the tension between greater uniformity and enforceability, as well as between the role of the courts of the enforcing forum versus those of the situs. Rather than being ignored, these tensions should be given due consideration by courts in interpreting the Convention’s provisions.”<sup>797</sup>

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<sup>795</sup> Jan Paulsson, ‘Towards Minimum Standards of Enforcement: Feasibility of a Model Law’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 574, 574.

<sup>796</sup> Hakeem Seriki, ‘Enforcement of Foreign Arbitration Awards and Public Policy – A Note of Caution’ (2000) 3 *Arbitration and Dispute Resolution Law Journal* 192, 207.

<sup>797</sup> Stephen Ostrowski and Yuval Shany ‘Chromalloy: United States Law and International Arbitration at the Crossroads’ (1998) 73 *New York University Law Review* 1650, 1664.

Such tensions have arisen because the New York Convention primarily intended to facilitate, rather than harmonise, the enforcement of arbitral awards.<sup>798</sup> It does not provide for uniform or consistent implementation of its pro-enforcement policy.

Accordingly, this Chapter examines two challenging questions for Australia, neither of which is addressed by the ILA Resolution.

The first question is whether Australian courts should adopt the same approach to the public policy exception in both enforcement and annulment proceedings.<sup>799</sup> In other words, should Australian courts adopt the same approach to the public policy exception in the non-enforcement provisions (ie New York Convention Art V, Model Law Art 36, IAA ss 8(5) and (7)), as well as in the annulment provisions (ie Model Law Art 34)? This raises questions concerning the distinction between foreign and domestic awards, as well as between supervisory and enforcement jurisdiction.

The second question is whether Australian courts should enforce an award which has been set aside in a foreign country.<sup>800</sup> This raises questions concerning the extent of the enforcement court's deference to the supervisory court's annulment, as well as the interplay between the annulment exception to enforcement in New York Convention Art V(1)(e) and the more favourable provision of Art VII(1).

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<sup>798</sup> Pierre Lastenouse, 'Why Setting Aside An Arbitral Award Is Not Enough to Remove It From The International Scene' (1999) 16(2) *Journal of International Arbitration* 25, 34.

In addition, the New York Convention was intended to address the 'underenforcement' (rather than the 'overenforcement') of arbitral awards: William Park, 'Duty and Discretion in International Arbitration' (1999) 93 *American Journal of International Law* 805, 811.

<sup>799</sup> See section 7.2 of this Chapter – 'Uniform approach to public policy in enforcement & annulment proceedings?'.

<sup>800</sup> See section 7.3 of this Chapter – 'Enforceability of foreign annulled awards'.

## 7.2 UNIFORM APPROACH TO PUBLIC POLICY IN ENFORCEMENT & ANNULMENT PROCEEDINGS?

“It is difficult to ascertain whether the practice of courts is less rigorous when asked to recognize or enforce a foreign award than they are when asked to set aside an award made in their own jurisdiction.”<sup>801</sup>

In the context of the public policy exception, it has been said that the reasons for non-enforcement of a foreign award must ‘go beyond the minimums which would justify setting aside a domestic judgment or award’.<sup>802</sup> This judicial statement, which has been interpreted as endorsing international public policy, indicates that some courts may be more reluctant to refuse enforcement of foreign awards than to annul domestic awards. The reasons include that domestic public policy is often perceived to be wider than international public policy, and that some courts are more willing to interfere with awards made in their own jurisdiction.<sup>803</sup>

Other courts, however, may be more reluctant to invoke public policy to annul domestic awards than to render foreign awards unenforceable. This is because the annulment exception to enforcement in New York Convention Art V(1)(e) seemingly makes the consequences of annulment more severe than the consequences of non-enforcement. For instance, an award which is unenforceable in one State may be enforced in another State, whereas an annulled award may remain unenforceable in other States.<sup>804</sup>

The question is essentially whether the differences between annulment and non-enforcement outweigh the interests of simplicity and consistency in favour of unifying judicial approaches to the public policy exception in annulment and enforcement proceedings.

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<sup>801</sup> ILA Interim Report 230.

<sup>802</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Bokhary PJ).

<sup>803</sup> Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 45 and 392.

<sup>804</sup> Carolyn Lamm and Eckhard Hellbeck, ‘The Enforcement of Foreign Arbitral Awards Under the New York Convention: Recent Developments’ (2002) 5 *International Arbitration Law Review* 137, 141.

See further discussions in section 7.3 of this Chapter – ‘Enforceability of foreign annulled awards’.

### 7.2.1 Revisiting the distinction between annulment & non-enforcement

The table below summarises the main differences and similarities between annulment and non-enforcement of arbitral awards.<sup>805</sup>

Annulment	Non-enforcement
Primary, supervisory or revisional jurisdiction (Supervisory State – ie place of rendition or origin)	Secondary or enforcement jurisdiction (Enforcement State – ie place of enforcement)
Supervisory court reviews validity of awards under domestic law (which may include the Model Law)	Enforcement court reviews enforceability of awards under the New York Convention
Extra-territorial effect under New York Convention Art V(1)(e)	Territorial effect only
Similar grounds – Model Law Art 34 adopts six of the seven grounds in New York Convention Art V (including the public policy ground)	

Despite the ‘parallelism’ of the grounds for annulment with those for non-enforcement,<sup>806</sup> there are terminological and practical differences which may affect each of the three stages in the application of the public policy exception.

At **stage one** (which determines whether there is an applicable public policy), the enforcement State and supervisory State have different public policies. Furthermore, even if an award is made and sought to be enforced in the same State, not all public policies of that State may apply to that award.

Courts which embrace the domestic-international distinction would use domestic public policies to set aside domestic awards, while using international public policies only to refuse the enforcement of foreign awards.<sup>807</sup> For instance, if an award which lacks reasons is made and sought to be enforced in State A which requires arbitrators to give reasons, then the court of State A (being both the supervisory court and enforcement court) may set aside this domestic award for contravening State A’s domestic public policy (or domestically mandatory rule).

<sup>805</sup> See also the earlier discussions in Chapter 5 section 5.4.3 – ‘Art V(2)(b) & (1)(e): Non-enforcement & Annulment of arbitral awards’.

<sup>806</sup> Explanatory Note on the Model Law, UN Doc A/40/17, para 43.

<sup>807</sup> Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 392.



However, if the award is made in State B which does not require the arbitrators to give reasons, then the court of State A (being the enforcement court only) may enforce this foreign award, unless such enforcement would contravene State A's international public policy (or internationally mandatory rule).<sup>808</sup>

If domestic public policy is indeed wider than international public policy, then annulment on the basis of public policy would be more frequent than non-enforcement on the basis of public policy. This assumes that clear distinctions can be made between domestic and international public policies, as well as between domestic and foreign awards – both of which are questionable.<sup>809</sup>

At **stage two** (which determines whether there is contravention of the applicable public policy), the public policy ground for annulment in Model Law Art 34(2)(b)(ii) refers to 'the award' whereas the public policy exceptions to enforcement in New York Convention Art V(2)(b) and Model Law Art 36(1)(b)(ii) refer to 'the recognition or enforcement of the award'. This reflects the fact that the focus of annulment proceedings is on an award's validity, whereas the focus of enforcement proceedings is on the consequences of enforcing that award. Problems relating to merits review and separability are more likely to arise in enforcement proceedings than in annulment proceedings.<sup>810</sup> Consequently, it may be more likely for a court to find public policy contravention in annulment proceedings than in enforcement proceedings. For instance, the arbitrator's non-application or misapplication of law may justify annulment but not necessarily non-enforcement.<sup>811</sup>

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<sup>808</sup> For examples, the law of State A may require both domestic and foreign awards to contain reasons; or the public policy of State A may prohibit the enforcement of foreign awards which do not comply with State A's mandatory laws.

<sup>809</sup> For discussions on the imprecise distinction between domestic and international public policies, see Chapter 3 section 3.3. For the equally imprecise distinction between foreign and domestic awards, see section 1 of the Introduction (Terminology – 'International commercial arbitration & foreign arbitral awards').

<sup>810</sup> Chapter 6 sections 6.3 and 6.4.3 address the issues of merits review and separability in the context of enforcement proceedings.

<sup>811</sup> See further discussions in section 7.2.2 of this Chapter – 'Case study: Arbitrator's disregard or error of law'.

At **stage three**, the word ‘may’ in both the non-enforcement provision of New York Convention Art V and the annulment provision of Model Law Art 34 allows the court to exercise its discretion against non-enforcement and annulment notwithstanding the public policy contravention. However, the degree of the court’s willingness to do so may differ, since annulment may prevent enforcement elsewhere. For the same reason, the degree of the court’s willingness to consider public policy *ex officio* may also differ.<sup>812</sup>

Therefore an identical approach to the public policy exception in both enforcement and annulment proceedings may be inappropriate or over-simplistic. Unfortunately, most national courts are yet to articulate, let alone to harmonise, their views on this issue, as shown by a selection of cases concerning the arbitrator’s disregard or error of law.<sup>813</sup>

### 7.2.2 Case study: Arbitrator’s disregard or error of law

The arbitrator’s disregard or error of law has been identified as casting a doubt on the exhaustive nature of New York Convention Art V.<sup>814</sup> The question is – should this be a ground for annulment under Model Law Art 34? If so, should this also be a ground for non-enforcement under New York Convention Art V?

The arbitrator’s disregard or error of law is not expressly mentioned in either the New York Convention or the Model Law. Yet it may be implied or incorporated into the public policy exception, given that public policy is inherently non-exhaustive. It may also be raised under the due process exception, at least to the extent of the overlap between that exception and the public policy exception.<sup>815</sup> However, according to the ILA, it is ‘widely accepted’ that procedural public policy should not include manifest disregard of law that is ‘unaccompanied by some serious procedural irregularity’.<sup>816</sup>

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<sup>812</sup> Both New York Convention Art V and Model Law Art 34 use the phrase ‘if the court finds that’, meaning that the court can invoke the public policy exception on their own motion.

<sup>813</sup> For a comprehensive coverage of the relevant cases, see Michael Hwang and Amy Lai, ‘Do Egregious Errors Amount to a Breach of Public Policy?’ (2005) 71 *Arbitration* 1.

<sup>814</sup> See the earlier discussions in Chapter 5 section 5.3.3(b) – ‘Exhaustive nature of Art V: Additional exceptions to enforcement by implication?’.

<sup>815</sup> See the earlier discussions in Chapter section 6.5 – ‘Case study 2: Due process’.

<sup>816</sup> ILA Final Report 256. See also Audley Sheppard, ‘Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?’ (2003) 1 *Oil, Gas & Energy Law Intelligence*.

Hence the suggestion that the public policy ground for annulment in Model Law Art 34 should invalidate ‘fundamentally flawed awards’ – ie awards which are ‘tainted with serious errors of law’ and ‘lead to demonstrably perverse results’.<sup>817</sup>

A selection of cases (primarily from the US, India and New Zealand) presents interesting comparisons and lessons for Australia.

**(a) The US approach**

The US courts define ‘manifest disregard of law’ as ‘something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law’ – for instance, ‘where an arbitrator understood and correctly stated the law but proceeded to ignore it’.<sup>818</sup>

The arbitrator’s manifest disregard of law has emerged as a non-statutory ground for annulment,<sup>819</sup> and even as an implied defence to enforcement of non-domestic awards.<sup>820</sup> Yet it remains inapplicable to ‘international awards’ that are governed by the New York Convention. The US courts treat ‘non-domestic awards’ differently from ‘international awards’. The former are made in the enforcement State (ie the United States) and contain foreign elements, whereas the latter are not made in the enforcement State.

In *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us Inc*,<sup>821</sup> the Court of Appeals held that non-domestic awards may be set aside because of the arbitrator’s manifest disregard of law – a ground which has been implied into the US Federal Arbitration Act.

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<sup>817</sup> Michael Hwang and Amy Lai, ‘Do Egregious Errors Amount to a Breach of Public Policy?’ (2005) 71 *Arbitration* 1, 16 and 24.

<sup>818</sup> *Freeman v Pike*, 266 F3d 78 (2<sup>nd</sup> Cir, 2001), extract in Yearbook Commercial Arbitration (US No. 379, para 16), <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>819</sup> Stephen Hayford, ‘Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards’ (1996) 30 *Georgia Law Review* 731, 774.

<sup>820</sup> David Stewart, ‘National Enforcement of Arbitral Awards under Treaties and Conventions’ in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994) 163, 194; Kevin Kennedy, ‘Invalidity of Foreign Arbitration Agreement or Arbitral Award’ (2004) 31 *American Jurisprudence Proof of Facts* 3d 495, para 23.

This is known as ‘the manifest disregard exception’: Kenneth Curtin, ‘Judicial Review of Arbitral Awards’ (2001) 55 *Dispute Resolution Journal* 56, 60.

<sup>821</sup> *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us Inc*, 126 F 3d 15 (2<sup>nd</sup> Cir, 1997).

It is interesting to note the Court's reliance on New York Convention Art V(1)(e) (ie the annulment exception to enforcement) to confirm their entitlement to apply US domestic law:

"The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief."<sup>822</sup>

However, the Court also confirmed that, unlike reading implied grounds into the Federal Arbitration Act, the exhaustive nature of New York Convention Art V means that other grounds for non-enforcement cannot be implied into the Convention:

"to the extent that the Convention prescribes the exclusive grounds for relief from an award under the Convention, that application of the Federal Arbitration Act's implied grounds would be in conflict, and is thus precluded."<sup>823</sup>

Accordingly, while the arbitrator's manifest disregard of law may be a ground for the annulment and non-enforcement of non-domestic awards, it is nevertheless not a valid ground for the annulment or non-enforcement of international awards.<sup>824</sup>

The reasons for such differentiation appear threefold. Firstly, the exhaustive nature of, and the narrow approach to, New York Convention Art V, indicate that the arbitrator's manifest disregard of law cannot be a separate or additional ground for non-enforcement. Secondly and more importantly, the arbitrator's manifest disregard of law 'does not rise to the level of contravening public policy' within the meaning of the

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<sup>822</sup> Ibid.

<sup>823</sup> Ibid. The Court continued: "There is now considerable case law holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Art V of the Convention are the only grounds available for setting aside an arbitral award... We join these courts in declining to read into the Convention the FAA's implied defenses to confirmation of an arbitral award."

<sup>824</sup> In *M & C Corp v Erwin Behr GmbH & Co*, 87 F3d 884, 851 (6<sup>th</sup> Cir, 1996), it was held that the FAA's implied grounds are inapplicable to the annulment of international awards.

Similarly in *Brandeis Intsel Ltd v Calabrian Chemicals Corp* 656 F. Supp. 160, 165 (SDNY 1987), it was held that the FAA's implied grounds are inapplicable for refusing enforcement of international awards.

See also *Baxter International Inc v Abbott Laboratories*, F3d 829 (7<sup>th</sup> Cir, 2003), especially Circuit Judge Easterbrook at 831); and *Europcar Italia v Maiellano Tours Inc*, 156 F3d 310, 316 (2<sup>nd</sup> Cir, 1998).

public policy exception in Art V(2)(b).<sup>825</sup> Lastly, the US courts are against merits review of arbitral awards.<sup>826</sup>

In light of their reluctance to read the arbitrator's manifest disregard of law into the public policy exception, the US courts seem reluctant to apply different approaches to the public policy exception in enforcement and annulment proceedings.

**(b) *The Indian approach***

*Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (the *Saw Pipes case*)<sup>827</sup> has evoked criticisms and concerns amongst commentators.<sup>828</sup> In that case, the Indian Supreme Court set aside a domestic award because the arbitral tribunal erroneously concluded that the relevant party had to prove its loss in order to obtain damages. The Court held that such an error was contrary to both Indian law and the parties' agreement, which constituted 'patent illegality' and therefore fell within the public policy ground for annulment under the Indian equivalent of Model Law Art 34.<sup>829</sup> In doing so, the Court effectively widened the meaning of 'public policy' in the context of annulment, thereby departing from its narrower definition in the context of non-enforcement. This warrants closer examination of the Court's reasoning.

The Indian Supreme Court began by emphasising that, in the absence of any statutory definition, public policy is 'susceptible to narrower or wider meaning', depending upon the context in which it is used, including the object and purpose of the relevant legislation.

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<sup>825</sup> See, eg, *Coutinho Caro & Co v Marcus Trading Inc*, United District Court of Connecticut, 14 March 2000, extract in Yearbook Commercial Arbitration (US No. 340) <<http://www.kluwerarbitration.com>> at 26 July 2004; *Brandeis Intsel Ltd v Calabrian Chemicals Corp* 656 F. Supp. 160, 165 (SDNY 1987).

<sup>826</sup> See, eg, *Brandeis Intsel Ltd v Calabrian Chemicals Corp* 656 F. Supp. 160, 165 (SDNY 1987).

See also *International Standard Electric Corporation v Bidas Sociedad Anonima Petrolera*, 745 F Supp 172 (SDNY 1990): "this principle is so deeply imbedded in the American, and specifically, federal jurisprudence, that no further elaboration of the case law is necessary."

<sup>827</sup> *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 (Supreme Court of India).

<sup>828</sup> See eg, Nadia Darwazeh and Rita Linnane, 'Set-aside and Enforcement Proceedings: The 1996 Indian Arbitration Act under Threat' (2004) 7 *International Arbitration Law Review* 81; SK Dholakia, 'International Arbitration and Expert Determination' (Paper presented at the LawAsiaDownunder Conference 2005, 23 March 2005); Michael Hwang, 'Do Egregious Errors Amount to a Breach of Public Policy? – Further Developments' (2005) 71 *Arbitration* 364, 366-367.

<sup>829</sup> Section 34(2)(b)(ii) of India's *Arbitration and Conciliation Act 1996* is the public policy ground for annulment.

The Court then referred to its earlier decision in the *Renusagar case*,<sup>830</sup> which confined ‘public policy’ to fundamental policy of Indian law, the interest of India, and justice or morality. This was followed by the Court’s controversial addition to this ‘narrower meaning’ of public policy – namely, the award could also be set aside ‘if it is patently illegal’:

“in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term ‘public policy of India’. On the contrary, wider meaning is required to be given so that ‘patently illegal award’ passed by the arbitral tribunal could be set aside.”<sup>831</sup>

Three rationales underlie the Indian Supreme Court’s expansion of the meaning of public policy in the context of annulment. Firstly, the Court seems to regard supervisory jurisdiction as wider than enforcement jurisdiction.<sup>832</sup> In particular, a supervisory court has the jurisdiction to interfere with an award which is ‘erroneous on the basis of record with regard to proposition of law or its application’.

Secondly, the Court is concerned that applying the narrow meaning of public policy in annulment proceedings would render some of the statutory provisions nugatory. This leads to the Court’s final reason that ‘wider meaning is required to be given so as to prevent frustration of legislation and justice’.<sup>833</sup>

The Court then ended with the following proposition, which illustrates the open-ended and non-exhaustive nature of public policy:

“Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.”

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<sup>830</sup> *Renusagar Power Co Ltd v General Electric Co*, Supreme Court of India, 7 October 1993, extract in Yearbook Commercial Arbitration XX (1995, India No. 22) <<http://www.kluwerarbitration.com>> at 26 July 2004, as previously discussed in Chapter 3 section 3.6.2.

<sup>831</sup> *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705. The Court continued: “Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in *Renusagar’s case*., it is required to be held that the award could be set aside if it is patently illegal.”

<sup>832</sup> *Ibid.* According to the Indian Supreme Court: “in a case where the judgment and decree is challenged before...the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider.” “The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited.”

<sup>833</sup> *Ibid.*, citing Nani Palkhivala: “If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India.”

One interpretation of this proposition is that a patently illegal award should be set aside if it is ‘so unfair and unreasonable that it shocks the conscience of the court’.<sup>834</sup> Supporters of the *Saw Pipes case* rely on this interpretation to illustrate that a patently illegal award would be inconsistent with ‘the fundamental policy of Indian law’, and therefore the *Saw Pipes case* did not unduly expand the scope of the public policy exception.<sup>835</sup>

By establishing patent illegality (specifically the arbitrator’s error of law) as ‘a new ground’ within the public policy ground for annulment,<sup>836</sup> the *Saw Pipes case* illustrates the Indian courts’ willingness to vary their approach, depending on whether public policy is raised as a ground for annulment or non-enforcement. This differs from the US approach, which views the arbitrator’s manifest disregard of law as an implied ground for annulment that is separate and independent from the public policy ground for annulment.

Pursuant to the Indian approach, both stages one and two of applying the public policy exception may differ between enforcement and annulment proceedings.

- At stage one, the scope of the public policy exception may be wider in annulment proceedings than in enforcement proceedings. In the *Saw Pipes case*, the arbitrator’s error of law was regarded as a type of illegality within the scope of the public policy exception. Such an approach has been criticised for conducting merits review ‘through the back door’<sup>837</sup> or ‘under the guise of public policy’,<sup>838</sup> as well as for broadening the meaning of ‘illegality’.<sup>839</sup>

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<sup>834</sup> See OP Malhotra, ‘The Scope of Public Policy under the Indian Arbitration and Conciliation Act 1996’ (2005) 71 *Arbitration* 36.

<sup>835</sup> According to OP Malhotra, ‘The Scope of Public Policy under the Indian Arbitration and Conciliation Act 1996’ (2005) 71 *Arbitration* 36, the *Saw Pipes case* ‘was not unjustified in adding a fourth imperative head to the three set forth in *Renusagar*’ because public policy is not immutable. The fourth head of patent illegality ‘is comprehended in the very first head’ of fundamental policy of Indian law. The Law Commission of India has also recommended that patent illegality should be a ground for annulment.

<sup>836</sup> Nadia Darwazeh and Rita Linnane, ‘Set-aside and Enforcement Proceedings: The 1996 Indian Arbitration Act under Threat’ (2004) 7 *International Arbitration Law Review* 81, 81.

<sup>837</sup> *Ibid*, 86 and 93.

<sup>838</sup> Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 393.

<sup>839</sup> See the criticisms in Nadia Darwazeh and Rita Linnane, ‘Set-aside and Enforcement Proceedings: The 1996 Indian Arbitration Act under Threat’ (2004) 7 *International Arbitration Law Review* 81, 84 and 86: ‘the Court employed a substantially different meaning of the term ‘illegality’ than that which has been

- At stage two, the threshold for establishing public policy violation may be lower in annulment proceedings than in enforcement proceedings. Illegality may render an award invalid under the supervisory State's public policy – but it does not necessarily make the enforcement of that award contrary to the enforcement State's public policy.

It will be illuminating to see whether the Indian Supreme Court will apply the wider meaning of public policy to determine the enforceability of foreign awards under the New York Convention.<sup>840</sup> The Court did not specifically exclude such awards from its reasoning in the *Saw Pipes case*. Nor did it overrule its definition of 'public policy' in the context of the New York Convention in the *Renusagar case*.

The Indian Supreme Court is at least mindful of preventing injustice when applying the public policy exception. A uniform approach to the public policy exception in enforcement and annulment proceedings should not achieve consistency and convenience at the expense of justice.

### (c) *Other countries*

In *Zimbabwe Electricity Supply Authority v Maposa* (the *Zimbabwe case*),<sup>841</sup> the arbitrator used the wrong commencement date for calculating the employee's entitlement for lost salary, resulting in a windfall to the employee. The High Court of Zimbabwe refused to set aside the award in the absence of any public policy violation, while refusing to enforce the award which required correction of the error. On appeal, the Supreme Court of Zimbabwe set aside the award under the public policy exception in Model Law Art 34:

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generally accepted and used in the public policy case law developed in international arbitration." "Generally, discussion of 'illegality' in arbitration context focuses upon the illegal nature of the underlying contract, its subject-matter and the circumstances surrounding the entering into of the contract or the arbitration agreement."

<sup>840</sup> The Indian Government is currently considering legislative changes to separate the challenge provisions for domestic arbitration from those for international arbitration. At present the Indian law that governs the challenge to arbitral awards is the same for both domestic and international arbitration held in India, the decisions rendered in the context of domestic arbitration also become precedents for international arbitration. See SK Dholakia, 'International Arbitration and Expert Determination' (Paper presented at the LawAsiaDownunder Conference 2005, 23 March 2005) 5.

<sup>841</sup> *Zimbabwe Electricity Supply Authority v Maposa*, High Court of Zimbabwe, 27 March and 9 December 1998 (CLOUT Case No. 267).



“Where..., the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above.”<sup>842</sup>

Contrast the two New Zealand cases, which insisted on a narrow approach to the public policy ground for annulment. In *Downer Connect Ltd v Pot Hole People Ltd*, the High Court in Christchurch accepted that the *Saw Pipes case* ‘seems to have taken a somewhat broader view’ of the public policy exception in Model Law Art 34(2)(b)(ii).<sup>843</sup> Randerson J then purported to apply the *Saw Pipes case* before concluding that the enforcement of an erroneous award in that case would neither ‘shock the conscience’ nor abuse ‘the integrity of the courts’ processes and powers’.<sup>844</sup> Furthermore, the arbitrator’s interpretation and application of the contractual provisions ‘did not contain any policy content which could possibly be regarded as bearing on the public policy of New Zealand’.<sup>845</sup>

*Downer-Hill Joint Ventures v Government of Fiji*<sup>846</sup> concerned an application to strike out an application for annulment. In that case, Downer-Hill and the Fijian government contracted to upgrade a road in Fiji. Downer-Hill’s claim for additional contractual payments and Fiji’s counterclaim were referred to arbitration. Unhappy with the overall net result of the arbitral award, Downer-Hill applied to the High Court in Wellington to set aside the award under Model Law Art 34(2)(b)(ii). Fiji responded by applying to strike out Downer-Hill’s application for annulment.

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<sup>842</sup> *Zimbabwe Electricity Supply Authority v Maposa*, Supreme Court of Zimbabwe, 21 October and 21 December 1999 (CLOUT Case No. 323).

<sup>843</sup> *Downer Connect Ltd v Pole Hole People Ltd*, (Unreported, New Zealand High Court, Christchurch, Randerson J, 19 May 2004).

<sup>844</sup> *Ibid.*

<sup>845</sup> *Ibid.*

<sup>846</sup> *Downer-Hill Joint Ventures v Government of Fiji* [2005] 1 NZLR 554 (New Zealand High Court, Wellington).

Wild and Durie JJ struck out all of Downer-Hill's claims. The amended and additional claims were time barred,<sup>847</sup> while the original claims were 'clearly untenable' or at least not 'seriously arguable'.<sup>848</sup> The original claims were based on several arbitral findings which were 'unsupported by evidence', 'unreasonable or 'against a substantial preponderance of evidence'.<sup>849</sup> Downer-Hill argued that the award was made in breach of the rules of natural justice, and therefore enforcing the award would contravene New Zealand public policy. Wild and Durie JJ concluded that Downer-Hill essentially sought to 'rerun its claims' by 'seeking to have the Court upset the result'.<sup>850</sup> Their treatment of the pre-existing cases warrant further analysis:

- Beginning with the statement that conflict with public policy in an award 'should be immediately or at least fairly rapidly apparent',<sup>851</sup> it was predictable that Wild and Durie JJ would depart from the wider approach in the *Zimbabwe case* and the *Saw Pipes case*.
- Wild and Durie JJ then interpreted the New Zealand Court of Appeal decision in *Amaltal Corporation v Maruha (NZ) Corporation Ltd*<sup>852</sup> as favouring a narrower view of the words 'public policy', which is consistent with the English Court of Appeal's statement in *DST v Rakoil*<sup>853</sup> that 'public policy arguments should be approached with extreme caution'.<sup>854</sup> Such an approach requires 'some element of illegality', or 'clear injury to the public good or abuse of the integrity of the Court's processes and powers'.<sup>855</sup>

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<sup>847</sup> Ibid, 565 (para 63) and 576 (para 108).

In its amended application for annulment, Downer-Hill alleged that the arbitrator's failure to decide the dispute in accordance with the contract was in breach of Model Law Art 28(4), and also in excess of jurisdiction. Consequently, the award contained 'serious and fundamental errors'. The Court noted (at 564, para 54) that the alleged contravention of New Zealand public policy was 'the connecting thread' with all of Downer-Hill's claims.

<sup>848</sup> Ibid, 571 (para 88) and 576 (para 109).

<sup>849</sup> Ibid, 566 (para 65).

<sup>850</sup> Ibid, 575 (para 106).

<sup>851</sup> Ibid, 565 (para 61).

<sup>852</sup> *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614, as previously discussed in Chapter 2 section 2.2.3(a) – 'Fundamentality: Case illustrations'.

<sup>853</sup> *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co and Shell International Co Ltd* [1987] 2 Lloyd's Rep 246.

<sup>854</sup> *Downer-Hill Joint Ventures v Government of Fiji* [2005] 1 NZLR 554, 568 (para 76).

<sup>855</sup> Ibid.

- This led to the endorsement of Richardson J's decision in *Downer Connect Ltd v Pot Hole People Ltd*, which purported to apply the *Saw Pipe case* and concluded that the arbitrator's error in that case did not fall within the public policy ground for annulment.<sup>856</sup>
- After referring to the phrases 'compelling reasons' and 'a very strong case' employed by the Hong Kong Court of Final Appeal in the *Hebei case*,<sup>857</sup> Wild and Durie JJ reiterated that the public policy ground for annulment in Model Law Art 34 'imposes a high threshold'.<sup>858</sup> For instance, the arbitrator's error 'must be fundamental to the reasoning or outcome of the award', resulting in 'substantial miscarriage of justice'.<sup>859</sup>

Thus, New Zealand courts appear inclined to adopt a uniform (and narrow) approach to the public policy exceptions in both the Model Law's annulment provision and non-enforcement provision (ie Arts 34 and 36). They embrace the view that 'the limited nature of judicial review of arbitral awards will require that the arbitrator's findings of fact and law be respected'.<sup>860</sup> Similarly, the Canadian courts endorse the view that authorities relating to New York Convention Art V are applicable to the corresponding provisions in Model Law Arts 34 and 36, including the narrow approach to those provisions.<sup>861</sup> However, they have disagreed on whether the arbitrator's error of law can be a ground for annulment.<sup>862</sup>

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<sup>856</sup> Ibid, 570 (para 81), endorsing *Downer Connect Ltd v Pole Hole People Ltd*, (Unreported, High Court, Christchurch, Randerson J, 19 May 2004).

<sup>857</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003, as discussed extensively in Chapter 6 section 6.5 – 'Case study 2: Due process'.

<sup>858</sup> Ibid, 570 (para 84).

<sup>859</sup> Hwang, Michael, 'Do Egregious Errors Amount to a Breach of Public Policy? – Further Developments' (2005) 71 *Arbitration* 364, 365.

<sup>860</sup> *Amaltal Corporation v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614, para 47.

See also *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] NZCA 131, paras 51 and 52.

<sup>861</sup> See, eg, *Corporacion Transnacional de Inversiones S.A. de C.V. v STET International S.p.A* (1999) 45 O.R. (3d) 183 (Ontario Superior Court of Justice) para 26.

<sup>862</sup> Ibid, paras 68-69, citing *Schreter v Gasmac Inc* (1992) 7 O.R. (3d) 608, 623 to confirm that the arbitrator's error of law is not a ground for annulment. This decision was upheld by the Ontario Court of Appeal: see *Corporacion Transnacional de Inversiones S.A. de C.V. v STET International S.p.A* (2000) 49 O.R. (2d) 414.

### 7.2.3 Crystal-gazing the Australian approach

Will Australian courts adopt the same approach to the public policy exception in both enforcement and annulment proceedings? Or will they follow the Indian approach of treating annulment differently? Several features of the Australian arbitration legislation indicate a preference for uniform (or at least consistent) treatment of the following categories of ‘foreign awards’ (ie awards involving foreign elements):<sup>863</sup>

- Enforcement of awards governed by the New York Convention under New York Convention Art V through the *International Arbitration Act* (IAA) – this category of foreign awards is confined to awards which are made in a Convention country other than Australia (known as ‘Convention awards’).
- Enforcement of ‘Model Law awards’ (ie awards governed by the Model Law but not the New York Convention) and other foreign awards under Model Law Art 36 – this category of foreign awards consists of: (a) awards made in non-Convention countries; and (b) awards made in Australia but involve foreign elements.
- Annulment under Model Law Art 34 – this category comprises Model Law awards, as well as Convention awards which also fall within the scope of the Model Law.

The residual category includes domestic awards (ie awards made in Australia and without any foreign element), and other foreign awards which are immune from both the New York Convention and the Model Law.<sup>864</sup> Here there is no express public policy exception in the *Commercial Arbitration Act* (CAA).

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See also British Columbia Supreme Court decision in *Quintette Coal Ltd v Nippon Steel Corporation* (1990) 47 BCL (2d) 201, which held that the Model Law gives no power to set aside an award on the basis of error of law.

Contrast the Quebec Court of Appeal decision in *Desputeaux v Editions Chouette* (Unreported, 18 April 2001) which set aside the award under Model Law Art 34(2)(b)(ii) because of the arbitrator’s misapplication of mandatory rules of Quebec law and public policy.

For other Canadian cases, see Michael Hwang and Amy Lai, ‘Do Egregious Errors Amount to a Breach of Public Policy?’ (2005) 71 *Arbitration* 1, 2-4.

<sup>863</sup> For the various meanings and categories of ‘foreign awards’, see section 1 of the Introduction (Terminology).

<sup>864</sup> As previously mentioned in Chapter 1 section 1.2.1(a), the parties can opt out of the Model Law under IAA s 21.

(a) ***Foreign awards: IAA, New York Convention & Model Law***

As discussed earlier, the New York Convention applies in Australia (through the IAA) to awards which are made in a Convention country other than Australia. In other countries, the New York Convention may also apply to awards which are made in any country other than the enforcement State, as well as awards which are made in the enforcement State but are nevertheless considered as non-domestic awards in the enforcement State.<sup>865</sup>

The New York Convention's narrower scope of application in Australia (due to the narrower Australian definition of 'Convention awards') means that more foreign awards may be governed by the Model Law. Otherwise the New York Convention exclusively governs the enforceability of awards which fall within the scope of both the New York Convention and the Model Law.<sup>866</sup>

It is thus appropriate to adopt the same approach for determining the enforceability of all categories of foreign awards under the public policy exceptions in New York Convention Art V and Model Law Art 36.

The same approach can appropriately extend to the public policy ground for annulment in Model Law Art 34, which, unlike the public policy ground for non-enforcement in Art 36, applies only if Australia is also 'the place of arbitration'.<sup>867</sup> This is supported by IAA s 19, which deems fraud, corruption and breach of natural justice to contravene Australian public policy for the purposes of both Arts 34 and 36. Further support is also found in ILA Resolution Rec 1(f):

"Whether the seat of the arbitration was located within the territory of the forum or abroad is not a consideration which should be taken into account by a court when assessing an award's conformity with international public policy."

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<sup>865</sup> These are known as the 'territorial criterion' and the 'functional criterion' in New York Convention Art I(1): see section 1 of the Introduction (Terminology – 'International commercial arbitration & foreign arbitral awards').

<sup>866</sup> See IAA s 20, as discussed in section 1.2.1(a) of Chapter 1.

<sup>867</sup> Model Law Art 1(2).

If an award involving a foreign element is made and sought to be enforced in Australia, then the relevant Australian court would have both supervisory and enforcement jurisdiction over that award. Supervisory jurisdiction is arguably wider than enforcement jurisdiction in the sense of more extensive judicial review or intervention. However, for the purposes of the public policy exception, the ILA appropriately recommends that ‘no distinction be made between international arbitral awards made in the jurisdiction of the enforcement court or abroad’ – the public policy standard or test should be the same.<sup>868</sup> There should be no differentiation between the various categories of foreign awards for the purposes of applying the public policy exception, because all of these awards involve foreign elements, and should be treated similarly even though they may be subject to different regulatory regimes.

Nonetheless, there remain different considerations and consequences even if Australia adopts a uniform approach to the public policy exceptions in all the non-enforcement provisions and annulment provisions.

At **stage one** of applying the public policy exception, Australian courts can apply the same criteria of fundamentality and extra-territoriality to determine whether the alleged public policy can fall within the public policy exception. Here Australian courts will balance the alleged public policy with the public policies in favour of arbitration (including the pro-enforcement policy).

Unlike the Indian approach in the *Saw Pipes case*,<sup>869</sup> Australian courts may be reluctant to widen the meaning of ‘public policy’ in the context of the annulment provision in Model Law Art 34. Apart from IAA s 19, Australian courts may endorse the view that public policy should have the same meaning in Model Law Arts 34 and 36, since both articles apply to foreign awards.

Yet the scope of the alleged public policy remains an important variable. Such public policy may apply to all categories of foreign awards; or alternatively, it may confine itself to Convention awards. The latter scenario would lead to different results, for the public policy exception would be inapplicable in the absence of any applicable public policy.

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<sup>868</sup> ILA Final Report 257.

<sup>869</sup> *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 (Supreme Court of India).

**Stage two** is where the application of the public policy exception is most likely to differ between annulment and enforcement proceedings. As previously mentioned, the annulment provision of Model Law Art 34 concerns the ‘award’ itself whereas the non-enforcement provisions of Art 36 and New York Convention Art V concern that award’s ‘enforcement’. For instance, an award which is illegal because of the arbitrator’s non-application or misapplication of Australian law may suffice to establish the public policy ground for annulment, whereas the public policy ground for non-enforcement may require that award to compel the parties to disregard Australian law. Similarly, an award which is illegal because it arises from an illegal contract may suffice to establish the public policy ground for annulment, whereas the public policy ground for non-enforcement may require that award to enforce that illegal contract.<sup>870</sup>

Finally, when deciding whether to exercise their discretion against annulment or non-enforcement at **stage three**, Australian courts may be influenced by the different consequences of annulment and non-enforcement. They may be reluctant to set aside an award if it would render that award unenforceable in other countries.<sup>871</sup> However, Australian courts should not refrain from annulment if such restraint would cause or condone injustice.

**(b) Domestic awards: CAA & IAA**

The ILA Resolution ‘did not address whether a different public policy standard should apply to purely domestic awards’.<sup>872</sup> Nonetheless, it has been predicted that many countries will have substantially similar regulatory regimes for domestic and foreign awards.<sup>873</sup>

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<sup>870</sup> See the earlier discussions in Chapter 6 section 6.4.3 – ‘Enforceability of awards based on illegal contracts – Limits on separability’.

<sup>871</sup> Section 7.3 of this Chapter explores the extra-territorial effect of annulment.

<sup>872</sup> ILA Final Report 257. A comprehensive examination of this issue is also beyond the scope of this thesis, which is confined to foreign awards.

<sup>873</sup> Neil Kaplan, ‘A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is There a Worldwide Trend Towards Supporting an International Arbitration Culture?’ in Albert Jan van den Berg (ed), *International Dispute Resolution: Towards an International Arbitration Culture* (1998) 187, 218.

In Australia, the concurrent operation of *International Arbitration Act* (IAA) and *Commercial Arbitration Act* (CAA) means that Australian courts may find it convenient or appropriate to use the same approach for awards which are not subject to the New York Convention or the Model Law, or which does not involve any foreign elements. Despite the absence of a comparable public policy exception to enforcement in the CAA, it remains possible to invoke the public policy exception in IAA s 8(7) to contest an application to enforce an award under CAA s 33.<sup>874</sup>

What is particularly noteworthy is that the CAA's grounds for annulment are confined to the arbitrator's misconduct and improper procurement of arbitration or award.<sup>875</sup> However, CAA s 4 defines 'misconduct' as including corruption, fraud and breach of the rules of natural justice, all of which are deemed to be 'in conflict with the public policy of Australia' under IAA s 19. There is also judicial acknowledgement that misconduct may arise from 'making an award which on grounds of public policy ought not to be enforced'.<sup>876</sup>

Thus it is arguable that the misconduct ground for annulment in CAA s 42 incorporates the public policy exception, or at least violation of procedural public policy.<sup>877</sup> If the public policy ground for annulment can be implied into CAA s 42, then Australian courts are likely to adopt the same narrow and cautious approach to it – such as minimising merits review and annulment, except where there is miscarriage of justice,<sup>878</sup> or substantial effect on the parties' rights.<sup>879</sup> Indeed, one of the CAA's 'major objectives' is 'to minimise judicial supervision and review'.<sup>880</sup>

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<sup>874</sup> See *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (1995) 128 FLR 458, as discussed in Chapter 1 section 1.2.1(b) ('Mechanics of enforcement: IAA & CAA') and Chapter 6 section 6.6.2 ('Severance & partial enforcement').

<sup>875</sup> See CAA s 42(1).

<sup>876</sup> *Holland Stolte Pty Ltd v Murbay Pty Ltd* [1991] ACTSC 89, para 15

<sup>877</sup> Interestingly, the judicial description of misconduct as an 'elephant' in *Enterra Pty Ltd v ADI Limited* [2002] NSWSC 700 para 8 resembles the judicial description of public policy as an 'unruly horse': "[Misconduct] is rather like an elephant – we know it when we see it. If we are in doubt we may gain assistance from the books, where we will however find no rigid definition of the species but instead statements of principle and multifarious examples of their application."

<sup>878</sup> *Rocci v Diploma Construction Pty Ltd* [2004] WASC 18, para 49.

<sup>879</sup> *Isicob Pty Ltd v Boulderstone Hornibrook (Qld) Pty Ltd* [2001] QSC 64.

<sup>880</sup> Western Australia, *Parliamentary Debates*, House of Representatives, 17 September 1997, 6310 (NF Moore).



It remains to be seen how Australian courts will interpret or utilise New York Convention Art III in this regard. Article III implements the pro-enforcement policy by prohibiting Convention countries from imposing ‘substantially more onerous conditions’ on the enforcement of foreign awards than they impose on the enforcement of domestic awards. Australian courts may interpret this article as disallowing, or at least discouraging, judicial reliance on the public policy exception to refuse enforcement of foreign awards more readily than domestic awards. In other words, they should not impose a lower or more lenient standard for establishing the public policy exception for foreign awards than for domestic awards. Alternatively, Australian courts may interpret Art III as endorsing a similar approach to the public policy exception to the enforcement of both foreign awards and domestic awards.

**(c) Public policy & arbitrator’s error of law**

Unlike the *Indian Saw Pipes case*,<sup>881</sup> Australian courts may not set aside awards merely because of the arbitrator’s error of law. Yet the CAA’s treatment of this issue seems somewhat convoluted.

Section 38(1) of the CAA specifically states that ‘the Court shall not have jurisdiction to set aside...an award on the ground of error of fact or law on the face of the award’. However, ss 38(2) and (3) empower the Supreme Court to set aside the award on determining an appeal ‘on any question of law arising out of an award’. The Supreme Court shall not grant leave for such an appeal unless it considers that determining the question of law could substantially affect the parties’ rights, and that there is ‘manifest error of law on the face of the award’.<sup>882</sup>

Australian courts have interpreted the expression ‘manifest error of law’ as requiring a ‘robust and narrow approach’ to granting leave to appeal – the error must be obvious or capable of being readily perceived, rather than merely arguable.<sup>883</sup>

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See also *Mond & Mond v Berger* [2004] VSC 45, para 74: “It is well established that the court’s legitimate role in reviewing awards is circumscribed.”

<sup>881</sup> *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 (Supreme Court of India).

<sup>882</sup> CAA s 38(5). Such appeal requires either the Supreme Court’s leave or the parties’ consent: s 38(4).

<sup>883</sup> *Carpaolo Nominees Pty Ltd & Epicure Pty Ltd v Marrosan Nominees Pty Ltd* (1997) 112 NTR 1, para 57.

Australian courts have also emphasised that appeals against awards under CAA s 38 differ from applications for annulment under CAA s 42.<sup>884</sup> Nevertheless, a successful appeal on the basis of manifest error of law may result in annulment under CAA s 38. Furthermore, there is judicial recognition that the arbitrator's error of law may constitute misconduct, which is a ground for annulment under CAA s 42.<sup>885</sup> This may be because the arbitrator's duty to render an enforceable award 'embraces the responsibility to ensure the award's substantive accuracy'.<sup>886</sup>

It would seem that the arbitrator's disregard or error of law, without more, is unlikely to justify the annulment or non-enforcement of all categories of foreign awards under the public policy exception. However, the prevention and sanction of injustice remain the ultimate and overriding concern. The *Zimbabwe case*<sup>887</sup> demonstrates that the arbitrator's error of law may fall within the public policy exception. Australian courts should not uphold an award's enforceability or validity if the arbitrator's disregard or error of law has caused injustice. Such 'egregious error'<sup>888</sup> would violate Australian public policy.

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<sup>884</sup> See *Villani v Delstrat Pty Ltd* [2002] WASC 112, para 29: "It is important to maintain the distinction between an appeal and an application to set aside an award on the grounds of misconduct. The scheme of the CAA and the general purpose of arbitrations will be undermined if misconduct proceedings are used as a guise to appeal against a decision on issues of fact."

<sup>885</sup> See, eg, *Rocci v Diploma Construction Pty Ltd* [2004] WASC 18, para 49, which refers to 'making an error of law of a character which might amount to misconduct'.

<sup>886</sup> Gunther Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 *Journal of International Arbitration* 135, 146.

<sup>887</sup> *Zimbabwe Electricity Supply Authority v Maposa*, Supreme Court of Zimbabwe, 21 October and 21 December 1999 (CLOUT Case No. 323), as discussed in section 7.2.2(c) of this Chapter.

<sup>888</sup> Hwang, Michael, 'Do Egregious Errors Amount to a Breach of Public Policy? – Further Developments' (2005) 71 *Arbitration* 364.

### 7.3 ENFORCEABILITY OF FOREIGN ANNULLED AWARDS

“Because of the differences between the grounds for vacating awards and the grounds for nonenforcement of awards (or perhaps the interpretation of those grounds), an award may be vacated by a court in the arbitral situs, yet nonetheless be enforceable under the national arbitration law of the enforcement court.”<sup>889</sup>

For the purposes of convenience and conciseness, this section uses the following expressions synonymously, unless otherwise indicated:

- ‘foreign annulled award’ and ‘annulled award’ (ie award set aside in the supervisory State);
- ‘foreign annulment judgment’, ‘foreign annulment’ and ‘foreign judgment’ (ie the supervisory court’s decision which sets aside the award).

Pursuant to the annulment exception to enforcement (ie New York Convention Art V(1)(e) and the mirroring Model Law Art 36(1)(a)(v) and IAA s 8(5)(f)), the enforcement court may refuse to enforce an award which has been set aside in ‘the country in which, or under the law of which, that award was made’.<sup>890</sup> Yet some enforcement courts have allowed enforcement notwithstanding such annulment, primarily on two bases. The first is that Art V(1)(e) is a discretionary exception to enforcement.<sup>891</sup> The second is that New York Convention Art VII allows (if not requires) enforcement through the application of the more favourable law.<sup>892</sup>

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<sup>889</sup> Christopher Drahozal, ‘Enforcing Vacated International Arbitration Awards: An Economic Approach’ (2000) 11 *American Review of International Arbitration* 451, 459. See also Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 498.

<sup>890</sup> Such country is known as the ‘supervisory State’, or the country of origin or rendition.

As previously mentioned in Chapter 5 section 5.4.3, Art V(1)(e) may give rise to two situations – ie ‘non-enforcement following annulment’ and ‘enforcement notwithstanding annulment’.

<sup>891</sup> The discretionary nature of Art V means that the enforcement court can exercise its discretion in favour of enforcement notwithstanding the applicability of the Art V exceptions to enforcement. See further discussions in section 7.3.4 of this Chapter – ‘Discretionary enforcement of annulled awards under New York Convention Art V(1)(e)’.

<sup>892</sup> New York Convention Art VII is known as ‘the more favourable provision’. See the earlier discussions in Chapter 5 section 5.4.3(b). See further discussions in section 7.3.4 of this Chapter.

Judicial enforcement of annulled awards has engendered fervent debate.<sup>893</sup> It is one of the 'high priority' topics for UNCITRAL's future work, as it is a 'source of serious concern' which may 'adversely affect the smooth functioning of international commercial arbitration'.<sup>894</sup> This is in spite of the present situation that annulment is also rare, as most national courts adopt a similarly narrow approach to the grounds for annulment in deference to the pro-arbitration policy.<sup>895</sup>

The challenge remains for Australian courts (and indeed other national courts) to 'put in place a harmonious and effective interaction between annulment and enforcement controls of arbitral awards'.<sup>896</sup> Accordingly, this section outlines the judicial disparities in determining the enforceability of annulled awards, and explores the reasons for such disparities. It then examines the two bases for enforcing annulled awards, highlighting any lessons and challenges for Australia.

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<sup>893</sup> For instance, the participants of the International Arbitration Congress held in Paris in May 1998 'agreed to disagree' on this topic: see Karl-Heinz Bockstiegel, 'Public Policy and Arbitrability' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 439.

There is also a wealth of literature on this topic, including Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002).

<sup>894</sup> Renaud Sorieul, 'Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration' (2000) 17 *Journal of International Arbitration* 163, 173.

As at the date of this thesis, UNCITRAL has merely examined the various issues and proposals associated with the debate without making any conclusions. It has expressed the view that 'the case law that gave rise to the issue should not be regarded as a trend': see *Annotated Provisional Agenda*, UN GA 43<sup>rd</sup> session, UD Doc A/CN.9/WG.11/WP.135 (19 July 2005) para 9, citing *Report of the UNCITRAL*, UN GAOR, 55<sup>th</sup> session, Supplement No. 17, UN Doc A/55/17 (2000) para 396.

<sup>895</sup> Carolyn Lamm and Eckhard Hellbeck, 'The Enforcement of Foreign Arbitral Awards Under the New York Convention: Recent Developments' (2002) 5 *International Arbitration Law Review* 137, 142; Albert Jan van den Berg, 'Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few' (1999) *ICC International Court of Arbitration Bulletin*, 'Arbitration in the Next Decade' Special Supplement 75, 84; Jan Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 574, 574.

<sup>896</sup> Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 3.

### 7.3.1 Judicial disagreement on the extra-territorial effect of annulment

The New York Convention is a successful treaty of uneasy compromises which is incomplete and ambiguous.<sup>897</sup> It is incomplete because it leaves its Contracting States to regulate the annulment of arbitral awards, resulting in the ‘heterogeneity’ of domestic laws despite the attempt to harmonise the grounds for annulment in Model Law Art 34.<sup>898</sup> It is ambiguous because it provides inadequate guidance on when an award becomes ‘binding’ for the purposes of the annulment exception of Art V(1)(e), as well as on the interrelationship between Art V(1)(e) and the more favourable provision of Art VII(1).

Thus judicial approaches to the enforcement of annulled awards are unavoidably unpredictable and even irreconcilable – as the following selection of French and US cases will illustrate.<sup>899</sup>

#### (a) *French approach – Enforcement notwithstanding foreign annulment*

In *Hilmarton v Omnium de Traitement et de Valorisation* (the *Hilmarton case*),<sup>900</sup> both the Paris Court of Appeal and the French Supreme Court held an award annulled in Switzerland to be enforceable in France by virtue of New York Convention Art VII(1). The enforcement of such an award is not contrary to the public policy of France because firstly, the award is not integrated into the Swiss annulment judgment and therefore ‘remains in existence even if set aside’;<sup>901</sup> and secondly, French law does not compel French courts to recognise the Swiss annulment.<sup>902</sup>

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<sup>897</sup> Ray Chan, ‘The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy’ (1999) 17 *Boston University International Law Journal* 141, 189.

<sup>898</sup> Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 9.

<sup>899</sup> For other cases, see Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 308ff.

<sup>900</sup> *Hilmarton v Omnium de Traitement et de Valorisation*, Paris Court of Appeal, 19 December 1991, extract in Yearbook Commercial Arbitration (France No. 18) <<http://www.kluwerarbitration.com>> at 27 July 2004, affirmed by Supreme Court of France, 23 March 1994, extract in Yearbook Commercial Arbitration (France No. 23) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>901</sup> *Hilmarton v Omnium de Traitement et de Valorisation*, French Supreme Court, 23 March 1994, extract in Yearbook Commercial Arbitration (France No. 23, extract para 5) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>902</sup> *Hilmarton v Omnium de Traitement et de Valorisation*, Paris Court of Appeal, 19 December 1991, extract in Yearbook Commercial Arbitration (France No. 18, extract para 4) <<http://www.kluwerarbitration.com>> at 27 July 2004.

What is of particular importance in the French courts' reasoning is that Art V(1)(e) does not apply when the enforcement State's domestic law permits enforcement – here the Swiss ground for annulment is not a ground for non-enforcement under French law.<sup>903</sup> Accordingly, the French courts have the duty (and not just the right) to apply the more favourable law under Art VII(1), even when enforcement would otherwise be refused under Art V(1)(e).<sup>904</sup> This suggests that the apparently mandatory Art VII(1) would prevail over the apparently discretionary Art V(1)(e) to the extent of their overlap or inconsistency.

It should nevertheless be noted that France is one of those rare countries whose arbitration law is even more arbitration-friendly or pro-enforcement than the New York Convention.<sup>905</sup>

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<sup>903</sup> Ibid, extract para 2.

<sup>904</sup> In an earlier case of *Palbalk v Norsolor*, French Supreme Court, 9 October 1984 (1985) Rev. Arb. 431, the French Supreme Court also enforced an award annulled in Austria for the same reason. Interestingly in that case, the Vienna Court of Appeal set aside the award because the arbitral tribunal disregarded Austrian law by applying the *lex mercatoria*, which the Austrian court considered to be 'a world law of doubtful validity'.

<sup>905</sup> For instance, the exhaustive list of exceptions to enforcement in the French New Code of Civil Procedure Art 1502 slightly differs from New York Convention Art V: (1) arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired agreement; (2) arbitral tribunal was irregularly composed or appointed; (3) arbitrator decided in a manner incompatible with the mission conferred upon him; (4) due process has not been respected; (5) enforcement is contrary to international public policy.

**(b) *Unsettled US approach – More likely to be non-enforcement following foreign annulment?***

The US courts remain divided on the issue of enforceability of annulled awards. In the controversial *Chromalloy Aeroservices Inc v Arab Republic of Egypt* (the *Chromalloy case*),<sup>906</sup> the US District Court of Columbia also relied on the more favourable provision of Art VII(1) to enforce an award annulled in Egypt. Like the French courts in the *Hilmarton case*, the US District Court regards the discretionary Art V(1)(e) as being subject to the mandatory Art VII(1):

“Art V provides a permissive standard, under which this Court *may* refuse to enforce an award. Art VII, on the other hand, mandates that this Court *must* consider Chromalloy’s claims under applicable US law.” (emphasis added)<sup>907</sup>

Foreign annulment is not a ground for non-enforcement under US arbitration law (specifically the Federal Arbitration Act).<sup>908</sup> Consequently, the award was enforceable as Chromalloy’s right to invoke the more favourable provisions of the Federal Arbitration Act through Art VII(1) superseded Egypt’s claim under Art V(1)(e).<sup>909</sup>

Additional factors also contributed to the enforcement of the annulled award in the *Chromalloy case*. The US District Court noted that US arbitration law demonstrates ‘an emphatic federal policy’ in favour of arbitration – thus to recognise the Egyptian annulment judgment ‘would violate this clear US public policy’.<sup>910</sup>

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<sup>906</sup> *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996), extract in Yearbook Commercial Arbitration (US No. 230) <<http://www.kluwerarbitration>> at 26 July 2004.

The *Chromalloy case* has been distinguished in subsequent US cases, including *Baker Marine (Nig.) Ltd v Chervon (Nig.) Ltd*, 191 F 3d 194 (2<sup>nd</sup> Cir, 1999), and *Spier v Calzaturificio Tecnica S.p.A.*, 71 F Supp 2d 279 (SDNY 1999), both of which are discussed later in this section. It has evoked both praise and criticism by commentators – see, eg, Kenneth Davis, ‘Unconventional wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Texas International Law Journal* 43 (supporter); Stephen Ostrowski and Yuval Shany ‘Chromalloy: United States Law and International Arbitration at the Crossroads’ (1998) 73 *New York University Law Review* 1650 (critics).

<sup>907</sup> *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996), extract in Yearbook Commercial Arbitration (US No. 230, para 23) <<http://www.kluwerarbitration>> at 26 July 2004.

<sup>908</sup> See Federal Arbitration Act s 10.

<sup>909</sup> *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996), extract in Yearbook Commercial Arbitration (US No. 230, para 5) <<http://www.kluwerarbitration>> at 26 July 2004.

<sup>910</sup> *Ibid*, extract para 18.

Furthermore, the US court was unimpressed by the Egyptian courts' 'open hostility'<sup>911</sup> towards arbitration in annulling the award, notwithstanding the fact that the parties have agreed not to appeal their award.<sup>912</sup>

Interestingly, two subsequent US cases have distinguished the *Chromalloy case* on the basis of no contractual waiver of the parties' right to challenge their awards.

In *Baker Marine (Nig.) Ltd v Chervon (Nig.) Ltd* (the *Baker Marine case*),<sup>913</sup> the Court of Appeals for the Second Circuit refused to enforce an award annulled in Nigeria. The Court concluded that Baker Marine 'has shown no adequate reason' for refusing to recognise the Nigerian annulment – for instance, it has made no contention that the Nigerian courts acted contrary to Nigerian law.<sup>914</sup> Unlike the *Chromalloy case*, recognising the Nigerian annulment judgment in this case would not violate any US public policy, since the parties did not violate any agreement in challenging the award.

Similarly in *Spier v Calzaturificio Tecnica S.p.A* (the *Spier case*),<sup>915</sup> the District Court of New York held that Spier had shown no adequate reason for refusing to recognise the Italian Supreme Court's annulment. Hence the award was unenforceable despite the discretionary nature of Art V.<sup>916</sup> Emphasising the distinguishing feature from the *Chromalloy case*, the Court commented that Egypt's blatant disregard of its contractual promise not to appeal the award in the *Chromalloy case* was 'singled out as violating the US public policy articulated in the Federal Arbitration Act thereby justifying the

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See an Australian interpretation of the *Chromalloy case* in *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312, 344: "the award was not open to challenge under US law and the US public policy in favour of final and binding arbitration of commercial disputes was so strong that the decision of the Egyptian court should not be recognised".

<sup>911</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1669.

<sup>912</sup> *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996), extract in Yearbook Commercial Arbitration (US No. 230, para 17) <<http://www.kluwerarbitration>> at 26 July 2004.

Some commentators regard this as the 'real *ratio decidendi*' of the *Chromalloy case*: see, eg, Renato Nazzini 'The Arbitral Award in the Multiple Interaction of State Legal Systems' (2001) 12 *European Business Law Review* 120, 125.

<sup>913</sup> *Baker Marine (Nig.) Ltd v Chervon (Nig.) Ltd*, 191 F 3d 194 (2<sup>nd</sup> Cir, 1999), extract in Yearbook Commercial Arbitration (US No. 288) <<http://www.kluwerarbitration>> at 26 July 2004.

<sup>914</sup> *Ibid*, extract paras 5 and 7.

<sup>915</sup> *Spier v Calzaturificio Tecnica S.p.A.*, 71 F Supp 2d 279 (SDNY 1999), extract in Yearbook Commercial Arbitration (US No. 325) <<http://www.kluwerarbitration>> at 26 July 2004.

<sup>916</sup> *Ibid*, extract para 31.



District Court's enforcement of the Egyptian award'.<sup>917</sup> This was followed by an interesting obiter comment in the *Spier case* that the application of the US domestic law would not assist Spier in any event, since the Italian ground for annulment (ie the arbitrators had exceeded their powers) was a ground for non-enforcement under the Federal Arbitration Act.<sup>918</sup> This suggests that Spier's reliance on the more favourable provision of Art VII(1) as an alternative basis for enforcement would also fail.

It seems that the US courts are at least cautious of the *Chromalloy case*, and are more inclined towards non-enforcement of annulled awards in recognition of foreign annulment judgments.<sup>919</sup> Elsewhere, it has also been observed that, '[w]ith some notable exceptions, courts around the world are still more than likely to decline to enforce annulled awards'.<sup>920</sup>

Debate on the enforceability of annulled awards nevertheless persists. It is timely to explore the 'cultural, judicial and legal diversity'<sup>921</sup> of disputes that pervade this debate.

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<sup>917</sup> Ibid, extract paras 27 and 32.

<sup>918</sup> Ibid, extract para 33.

<sup>919</sup> It has been predicted that other US courts will seek to distinguish the *Chromalloy case* 'in the same or different ways': see Michael Hwang and Andrew Chan, 'Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries' in Albert Jan van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (2001) 145, 151.

See also Dana Freyer, 'United States Recognition and Enforcement of Annulled Foreign Arbitral Awards: The Aftermath of the Chromalloy Case' (2000) 17 *Journal of International Arbitration* 1.

<sup>920</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 540.

For examples, the courts in the Netherlands, Belgium and Germany have refused to enforce annulled awards: see Richard Mosk and Ryan Nelson, 'The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions' (2001) 18 *Journal of International Arbitration* 463, 473.

<sup>921</sup> Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 7.

### 7.3.2 Debates within the never-ending debate

#### (a) *The main issues or contentions*

The first question is **whether an award still exists after its annulment**. Those who argue that an annulled award no longer exists would agree that ‘there is nothing to enforce’ after annulment.<sup>922</sup> They would interpret the New York Convention as dealing with existing awards only and therefore it ‘cannot breathe new life into a vacated award’.<sup>923</sup>

Others insist that the New York Convention does not imply that an annulled award is ‘non-existent at international level’,<sup>924</sup> since an award’s existence ‘cannot be assumed to be a matter for the exclusive determination’ by the courts in the supervisory State.<sup>925</sup>

This leads to the second question of **whose law governs the existence and validity of an annulled award**. On the one hand, Art V(1)(e) ‘gives recognition to the principle that the legal validity of an award is, primarily, a matter for the court of the supervisory jurisdiction to decide’.<sup>926</sup> On the other hand, cases such as *Chromalloy*<sup>927</sup> and *Hilmarton*<sup>928</sup> suggest that the New York Convention does not require the enforcement court to determine an award’s validity under the law of the supervisory State.<sup>929</sup> In other

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<sup>922</sup> This applies the principle of *ex nihil fit* (ie nothing can come of nothing): see Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 441.

<sup>923</sup> Philipp Wahl, ‘The Chromalloy Case Revisited’ (1999) 16 *Journal of International Arbitration* 131, 137.

<sup>924</sup> Renato Nazzini, ‘The Law Applicable to the Arbitral Award’ (2002) 5 *International Arbitration Law Review* 179, 185; Stephen Ostrowski and Yuval Shany ‘Chromalloy: United States Law and International Arbitration at the Crossroads’ (1998) 73 *New York University Law Review* 1650, 1684.

<sup>925</sup> *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999) para 137.

See, eg, the French approach in the *Hilmarton case*, as previously discussed in section 7.3.1(a) of this Chapter.

<sup>926</sup> *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), <<http://www.hklii.org>> at 5 November 2003 (Litton PJ).

<sup>927</sup> *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996).

<sup>928</sup> *Hilmarton v Omnium de Traitement et de Valorisation*, Paris Court of Appeal, 19 December 1991, extract in Yearbook Commercial Arbitration (France No. 18) <<http://www.kluwerarbitration.com>> at 27 July 2004.

<sup>929</sup> See Renato Nazzini, ‘The Law Applicable to the Arbitral Award’ (2002) 5 *International Arbitration Law Review* 179, 183, 186 and 189.

words, the supervisory State does not have ‘the sole judicial control’<sup>930</sup> or ‘judicial monopoly’<sup>931</sup> over an award.

Linked to the choice of law question is the third question of **whether an award should be subject to ‘double judicial control’**<sup>932</sup> or ‘dual State control’.<sup>933</sup> Here the argument of minimal judicial intervention can be used by either side of the debate. Whilst the enforcement court should not revisit the supervisory court’s annulment decision, the enforcement court should nevertheless be able to disregard the supervisory court’s annulment which is ‘aberrational’, ‘arbitrary or clearly erroneous’.<sup>934</sup>

Similarly, arguments based on justice and forum shopping can also be used by either side of the debate. On the one hand, ‘a party against whom an award was unjustly made and which ought to be set aside on internationally recognised grounds’ should be able to obtain annulment that is effective world-wide.<sup>935</sup> On the other hand, a party whose award is unjustly annulled should not be precluded from obtaining enforcement elsewhere.<sup>936</sup>

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<sup>930</sup> *Committee on the Enforcement of International Arbitral Awards - Summary Record of the 7<sup>th</sup> Meeting*, UN ESC, UN Doc E/AC.42/SR.7 (29 March 1955) para 16.

<sup>931</sup> Philipp Wahl, 'The Chromalloy Case Revisited' (1999) 16 *Journal of International Arbitration* 131, 135.

<sup>932</sup> Albert Jan van den Berg, ‘Annulment of Awards in International Arbitration’ in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (1994) 133, 159.

<sup>933</sup> Ray Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy' (1999) 17 *Boston University International Law Journal* 141, 214.

<sup>934</sup> *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999) para 139; Christopher Drahozal, ‘Enforcing Vacated International Arbitration Awards: An Economic Approach’ (2000) 11 *American Review of International Arbitration* 451, 467; Ray Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A critique of Chromalloy' (1999) 17 *Boston University International Law Journal* 141, 214.

For instance, annulment is based on ‘local parochialism, whether in the form of favouritism for a country’s nationals or suspicion of arbitration’: Kenneth Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 *Texas International Law Journal* 43, 79.

<sup>935</sup> *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999) para 140.

<sup>936</sup> *Ibid*, para 138.

The reality of a dual system of judicial control reflects the need to manage the risks of both unjust awards and unjust annulments. This leads to the fourth question of **which court should have the ultimate control over an award**. The supervisory court has the primary role of review and supervision,<sup>937</sup> while the enforcement court's secondary role should entail an independent review of both the award and that award's annulment.<sup>938</sup>

Unfortunately the drafters of the New York Convention merely considered (but without further debate) the possible division of judicial control between the supervisory court and enforcement court 'by enumerating the grounds on which an award could be annulled before the first forum or refused enforcement before the second forum'.<sup>939</sup> The absence of a multilateral convention on jurisdiction over annulment and the extent of judicial control over awards during annulment proceedings is indeed 'one of the major gaps in the international arbitral framework'.<sup>940</sup>

Overlaying this dilemma is the final question concerning **the extent of the enforcement court's deference to the supervisory court's annulment**. From the enforcement court's perspective, the supervisory court's annulment is a foreign judgment. The enforcement court's recognition of such foreign judgment would preclude enforcement of the annulled award. Conversely, the enforcement court's enforcement of the annulled award is effectively non-recognition of the foreign judgment.

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<sup>937</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, 782 (Colman J).

<sup>938</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1689.

<sup>939</sup> *Committee on the Enforcement of International Arbitral Awards - Summary Record of the 7<sup>th</sup> Meeting*, UN ESC, UN Doc E/AC.42/SR.7 (29 March 1955) para 16.

<sup>940</sup> Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 157 para 366.

For the various reform proposals (which are beyond the scope of this thesis), see Jan Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 574, 577 (proposed new Model Law provisions to define and limit the powers of both the supervisory court and enforcement court); Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 157ff (proposed new convention on the jurisdiction over the annulment of awards and the grounds for annulment, together with a supranational court which has exclusive jurisdiction over the control of awards).

Subject to the applicable international conventions concerning the recognition and enforcement of foreign judgments,<sup>941</sup> the enforcement court is not obliged to recognise the supervisory court's annulment judgment. Yet the enforcement court may wish to do so in the interests of judicial comity.<sup>942</sup> When balancing between the enforcement of foreign annulled awards and the recognition of foreign judgments, it has been suggested that 'only judgments independently deserving of recognition should be capable of barring enforcement of an award'.<sup>943</sup> This entails a balancing of public policies – for public policy is an exception to both the enforcement of foreign awards and the recognition of foreign judgments.

**(b) *The competing approaches or theories***

The various approaches to the enforcement of annulled awards may be viewed as a spectrum. At one end of the spectrum is the 'traditional' or 'territoriality' approach, which advocates that annulled awards are unenforceable because their annulment renders them non-existent.<sup>944</sup> It favours giving the supervisory court the ultimate (if not the sole) control over the validity of awards.<sup>945</sup>

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<sup>941</sup> See, eg, *European Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (No 44/2001, entered into force 1 March 2002) Art 34(1); *Convention on Choice of Court Agreements* (concluded 30 June 2005) Art 9.

<sup>942</sup> *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999) para 141.

In *Sea Dragon Inc v Gebr Vam Weelde Scheepvaartakntoor BV*, 574 F Supp 367 (SDNY 1983), an award was held to be unenforceable partly because of its inconsistency with a foreign judgment. The court emphasised the 'firm and established policy of American courts to respect a valid foreign decree' – 'the doctrine of comity founded on diplomatic respect for valid foreign judgments'.

<sup>943</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1690.

<sup>944</sup> See the discussions in Christopher Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 *American Review of International Arbitration* 451, 461-462; Kenneth Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 *Texas International Law Journal* 43, 79; Karl-Heins Bockstiegel, 'Summary of Discussion in the Third Working Group' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 433, 438; Albert Jan van den Berg, 'Enforcement of Annulled Awards?' (1998) 9 *ICC International Court of Arbitration Bulletin* 15, 16.

<sup>945</sup> The rationale is that parties' choice of seat of arbitration means that they agree the courts of that country to oversee their arbitration and award: see Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 443-444.

In addition, centralising judicial supervision in the arbitral situs may reduce the likelihood of multiple enforcement proceedings: see Christopher Drahozal, 'Enforcing Vacated International Arbitration awards: An Economic Approach' (2000) 11 *American Review of International Arbitration* 451, 476.

At the other end of the spectrum is the ‘internationalist approach’ (also known as the theory of delocalisation or de-nationalisation of arbitration),<sup>946</sup> which advocates that annulled awards remain enforceable elsewhere because they are ‘stateless’ or ‘floating’ in the sense that they ‘can never be set aside once and for all’.<sup>947</sup> It seeks to maximise enforceability of awards by minimising the supervisory court’s control, in the sense of giving the enforcement court the freedom to disregard the supervisory court’s annulment and thereby enforce the annulled award.<sup>948</sup> The French court in the *Hilmarton case*<sup>949</sup> and the US court in the *Chromalloy case*<sup>950</sup> apparently represent this approach. Yet their approach is not strictly internationalist or delocalised – for they rely on New York Convention Art VII(1) to apply their own domestic law instead of deferring to the supervisory State’s domestic law.

In the middle of the spectrum is the ‘comity approach’, which instructs the enforcement court to respect the supervisory court’s annulment, unless that annulment is ‘procedurally unfair or contrary to fundamental notions of justice’.<sup>951</sup> The US cases of *Baker Marine*<sup>952</sup> and *Spier*<sup>953</sup> are illustrative of this approach. The discretionary nature

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For instance, in *Oberlandesgericht (Court of Appeal), Restock*, 28 October 1999, published in *Hamburger Seerechts Report* (1999) 199, the German court refused to enforce an award annulled in Russia (by both the City Court and Court of Appeal of Moscow) under Art V(1)(e): “This [annulment] decision must be recognised without examining whether it would be recognizable according to the standards for the recognition of foreign decisions.”

<sup>946</sup> Kenneth Davis, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Texas International Law Journal* 43, 79; Renato Nazzini ‘The Arbitral Award in the Multiple Interaction of State Legal Systems’ (2001) 12 *European Business Law Review* 120, 122.

<sup>947</sup> Emmanuel Gaillard, ‘Enforcement of Awards Set Aside in the Country of Origin: The French Experience’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 505, 523; Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 441.

<sup>948</sup> Renato Nazzini, ‘The Law Applicable to the Arbitral Award’ (2002) 5 *International Arbitration Law Review* 179, 180; Kenneth Davis, ‘Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (2002) 37 *Texas International Law Journal* 43, 79.

<sup>949</sup> *Hilmarton v Omnium de Traitement et de Valorisation*, Paris Court of Appeal, 19 December 1991, extract in *Yearbook Commercial Arbitration* (France No. 18) <<http://www.kluwerarbitration.com>> at 27 July 2004.

<sup>950</sup> *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996).

<sup>951</sup> Christopher Drahozal, ‘Enforcing Vacated International Arbitration Awards: An Economic Approach’ (2000) 11 *American Review of International Arbitration* 451, 453; Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 443.

<sup>952</sup> *Baker Marine (Nig.) Ltd v Chervon (Nig.) Ltd*, 191 F 3d 194 (2<sup>nd</sup> Cir, 1999).

of New York Convention Art V(1)(e) enables the enforcement court to balance the enforcement of foreign awards with the recognition of foreign judgments.

Pursuant to the last two approaches, awards annulled in one country are potentially enforceable in another country. This leads to the evaluation of the two bases for such enforcement – namely, application of the enforcement State's more favourable law under New York Convention Art VII(1) (see section 7.3.3), and discretionary enforcement under Art V(1)(e) (see section 7.3.4).

### 7.3.3 Enforcement of annulled awards under New York Convention Art VII(1)

An enforcement court may enforce an annulled award under the more favourable provisions of Art VII(1) if, pursuant to its domestic law, foreign annulment (eg the *Chromalloy case*) or the foreign court's ground for annulment (eg the *Hilmarton case*) does not preclude enforcement. In other words, the enforcement State has 'more lenient domestic standards for enforcement' which should prevail over the New York Convention.<sup>954</sup> Nonetheless, Art VII's flexibility and potential conflict with the annulment exception of Art V(1)(e) risk misuse or abuse. The tension (or unexplained relationship) between Arts VII(1) and V(1)(e) is another paradox of the New York Convention.<sup>955</sup> Consequently, the meaning and effect of Art VII is also one of UNCITRAL's future work topics.<sup>956</sup>

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<sup>953</sup> *Spier v Calzaturificio Tecnica S.p.A.*, 71 F Supp 2d 279 (SDNY 1999).

<sup>954</sup> Pierre Lastenouse, 'Why Setting Aside an Arbitral Award is not Enough to Remove it From the International Scene' (1999) 16(2) *Journal of International Arbitration* 25, 34; Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 320 para 7.50.

<sup>955</sup> Unfortunately, the legislative history of the Convention does not discuss the relationship between Arts V and VII: Kenneth Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 *Texas International Law Journal* 43, 62.

<sup>956</sup> *Report of the Working Group on Arbitration on the Work of its 32<sup>nd</sup> Session*, UN GA, 33<sup>rd</sup> session, UN Doc A/CN.9/468 (10 April 2000) para 109(k).

The UNCITRAL Secretariat has noted the need for additional study on the application by Convention countries of Art VII, after a recent survey on the legislative implementation of the New York Convention conducted in cooperation with the International Bar Association. See *Interim Report on the Survey Relating to the Legislative Implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Note by the Secretariat*, UN GA, 38<sup>th</sup> session, UN Doc A/CN.9/585 (23 May 2005), especially paras 61 and 73.

Greater enforceability of arbitral awards and greater uniformity of enforcement practice are the New York Convention's 'two primary goals'.<sup>957</sup> Article VII implements, or at least represents, the goal of greater enforceability by allowing enforcement under the enforcement State's domestic law, while Art V seeks to achieve uniformity by prescribing an exhaustive list of exceptions to enforcement.<sup>958</sup>

Acknowledging that the pursuit of these two goals may create conflict,<sup>959</sup> the New York Convention appears to prefer greater enforceability (as indicated by the mandatory or obligatory language of Art VII) over uniformity (as indicated by the discretionary or permissive language of Art V).<sup>960</sup> This is because the New York Convention's main goal was to 'facilitate' the enforcement of foreign awards, rather than to 'harmonize solutions at the international level'.<sup>961</sup> Yet the New York Convention does not expressly state that Art VII should trump Art V in the event of conflict.

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<sup>957</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1656-1657.

See also *Scherk v Alberto-Culver*, 417 US 506, 520 (1974): "The goal of the Convention...was to encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which...arbitral awards are enforced in the signatory countries."

<sup>958</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1661.

<sup>959</sup> For instance, if Art VII encourages the national courts to adopt 'individualized criteria for the enforcement of foreign arbitral awards', then this will 'defeat the objectives of harmonisation and unification of domestic laws': *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999) para 132.

See also Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1656-1657.

<sup>960</sup> Pierre Lastenouse, 'Why Setting Aside an Arbitral Award is not Enough to Remove it From the International Scene' (1999) 16(2) *Journal of International Arbitration* 25, 34.

<sup>961</sup> *Ibid.*

The apparent neutrality or compromise in the New York Convention in this regard has been criticised for its ambiguity and uncertainty (see, eg, Matthieu de Boissesson, 'Enforcement in Action: Harmonization Versus Unification' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 593, 595-596), while being praised for its flexibility at the same time (see, eg, Philippe Fouchard, 'Suggestions to Improve the International Efficacy of Arbitral Awards' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 601, 607).



The enforcement courts in the *Hilmarton case* and the *Chromalloy case* enforced annulled awards by applying Art VII(1) in preference to Art V(1)(e).<sup>962</sup> However, in both cases the courts could have reached the same outcome by applying Art V(1)(e) solely, or in conjunction with Art VII(1) – namely, by exercising their discretion in favour of enforcement on the basis that the annulled awards would otherwise be enforceable under their domestic law. Indeed, any tension between Arts VII and V is partially reconcilable because Art V, like Art VII, also promotes the same goal of enforceability.<sup>963</sup> The discretionary and exhaustive nature of Art V embodies the pro-enforcement policy, under which an enforcement court can rely on its domestic law to allow enforcement, but not to refuse enforcement.

#### **7.3.4 Discretionary enforcement of annulled awards under New York Convention Art V(1)(e)**

In light of the controversies surrounding Art VII's applicability and priority over Art V, the judicial discretion given by Art V may be a less controversial basis for enforcing annulled awards. The annulment exception of Art V(1)(e) gives the enforcement court the discretion to either refuse or allow enforcement of annulled awards. The question is how the enforcement court should exercise such a discretion.<sup>964</sup> The enforcement court needs to balance between, on the one hand, the pro-enforcement policy in favour of enforcing foreign awards; and on the other hand, the 'general presumption' or comity in favour of recognising foreign judgments.<sup>965</sup>

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<sup>962</sup> But note the statement in *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia 1996), extract in Yearbook Commercial Arbitration (US No. 230, para 24) <<http://www.kluwerarbitration.com>> at 26 July 2004: "Art VII does not eliminate all considerations of Art V; it merely requires that this court protect any rights that Chromalloy has under the domestic laws of the US."

<sup>963</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1661-1662.

<sup>964</sup> During UNCITRAL's debate on its future work, one of the questions raised was the degree to which, non-enforcement based on Art V(1)(e) is discretionary: see *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999) para 130.

<sup>965</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1687.

An annulled award is prima facie unenforceable under Art V(1)(e), unless its annulment should not be recognised. The US cases of *Baker Marine* and *Spier* seemingly endorse this approach by requiring ‘adequate reason’ for refusing to recognise the foreign annulment judgment.<sup>966</sup> Premised on a system of dual State control, this approach arguably ‘achieves a balanced result’.<sup>967</sup> Furthermore, this comity-driven approach conforms to the letter and spirit of Art V(1)(e). Nonetheless, the challenge is to define the grounds for refusing to recognise the foreign annulment judgment, including the circumstances that the enforcement court can consider in this balancing exercise.

The suggested exceptions to the recognition of foreign annulment include the following:<sup>968</sup>

- The foreign annulment judgment is obtained or otherwise tainted by fraud – this is a well-established exception to the recognition of foreign judgments.<sup>969</sup>
- The foreign court which annulled the award is corrupt, biased, or fails to observe due process – this is another common exception which is related to the public policy exception to the recognition of foreign judgments.

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<sup>966</sup> *Baker Marine (Nig.) Ltd v Chervon (Nig.) Ltd*, 191 F 3d 194 (2<sup>nd</sup> Cir, 1999), extract in Yearbook Commercial Arbitration (US No. 288, paras 5 & 7) <<http://www.kluwerarbitration.com>> at 26 July 2004; *Spier v Calzaturificio Tecnica S.p.A.*, 71 F Supp 2d 279 (SDNY 1999), extract in Yearbook Commercial Arbitration (US No. 325, para 31) <<http://www.kluwerarbitration.com>> at 26 July 2004.

<sup>967</sup> See Ray Chan, ‘The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy’ (1999) 17 *Boston University International Law Journal* 141, 214: “The judiciary in the country of origin retains the primary supervision of awards made within its territory, but judiciaries in enforcement countries maintain a secondary supervision of awards to ensure that the judiciary in the country of origin does not itself violate due process or judicial integrity in its primary supervisory role. The system of international arbitration... depends on a system of checks and balances and accountability to maintain integrity... While secondary supervision should not be second-guessing, it should serve as an effective deterrent against naked abuse of the supervisory system in the country of origin.”

<sup>968</sup> See Gary Sampliner, ‘Chromalloy Revisited’ (1997) 14 *Journal of International Arbitration* 141, 160-163; Ray Chan, ‘The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy’ (1999) 17 *Boston University International Law Journal* 141, 146 and 213; Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 322 para 7.57; William Park, ‘Duty and Discretion in International Arbitration’ (1999) 93 *American Journal of International Law* 805, 813 and 823.

<sup>969</sup> See, eg, *Foreign Judgments Act 1991* (Cth) 7(2)(vi); *European Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (No 44/2001, entered into force 1 March 2002) Art 34(1); *Convention on Choice of Court Agreements* (concluded 30 June 2005) Art 9(1)(d).

- The annulment proceedings and/or the foreign annulment judgment are in breach of the parties' agreement regarding finality of arbitration and the extent of judicial review – this is a distinguishing feature of the *Chromalloy case* which prompted the US court to disregard the foreign annulment.<sup>970</sup>
- The foreign annulment judgment is contrary to the enforcement State's public policy – this is another basis for allowing enforcement of the annulled award in the *Chromalloy case*.

Public policy is an exception to both the enforcement of foreign awards and the recognition of foreign judgments. This is why the enforcement court has the difficult task of ensuring that the unruly horse of public policy 'pulls in the right direction'<sup>971</sup> when deciding whether or not to enforce an annulled award. The enforcement court is expected to avoid reviewing the merits of both the awards and their annulment. Such merits review is nevertheless unavoidable (if not justifiable) and should therefore be permissible. The challenge is the extent of the enforcement court's inquiry – namely, to find and maintain an appropriate balance between, on the one hand, excessive or intrusive scrutiny which unduly prolongs the arbitral process; and on the other hand, cursory or inadequate review which overlooks arbitral or judicial injustice.

Furthermore, the enforcement court is expected to avoid using its domestic standards or 'local peculiarities'<sup>972</sup> to deny recognition of the foreign annulment judgment on the basis that the award was annulled under the foreign State's domestic standards or local peculiarities. Such parochial, chauvinistic or non-reciprocal application of public policy should be discouraged.<sup>973</sup>

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<sup>970</sup> Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1687 and 1693.

But see the criticism in Gharavi Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 100 para 240: the parties' contractual stipulation 'does not seem to foreclose all judicial review of arbitral awards such as by an action to set aside at the seat of arbitration'.

<sup>971</sup> Jay Forder, 'Taming the Unruly Horse! Contractual Illegality and Public Policy: *Fitzgerald v FJ Leonhardt Pty Ltd*', High Court Review 301 <<http://www.bond.edu.au/law/hrc/articles/301forder.htm>> at 22 June 2004, para 82.

<sup>972</sup> Jan Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 574, 576.

<sup>973</sup> Otherwise the comity approach may cause 'the unfortunate return to nationalism and all the chauvinism relating thereto', which is 'condescending for its overall disregard of foreign annulment

Accordingly, the *Chromalloy* case has been criticised for enforcing an annulled award on the basis that the supervisory court's ground for annulment does not comport with the enforcement State's ground for non-enforcement.<sup>974</sup> Even if one can interpret the *Chromalloy* case as recognising 'an international public policy in favour of rescuing wrongly annulled awards',<sup>975</sup> such international public policy remains US public policy, which may not be shared by other countries.

Thus it has been suggested that an important factor for consideration is whether the supervisory court's grounds for annulment are comparable to, or consistent with, the grounds in Model Law Art 34 (which substantially mirror the grounds for non-enforcement in New York Convention Art V).<sup>976</sup> This is based on Paulsson's distinction between 'international standard annulment' and 'local standard annulment' – the enforcement court can justifiably defer to the former (ie awards annulled under international standards such as Model Law Art 34 should be unenforceable), whereas the enforcement court is entitled to disregard the latter (ie awards annulled under the supervisory State's local standards should remain enforceable).<sup>977</sup>

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decisions': Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) paras 295 and 314.

<sup>974</sup> See, eg, Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1671.

<sup>975</sup> Ray Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy*' (1999) 17 *Boston University International Law Journal* 141, 180.

<sup>976</sup> Renaud Sorieul, 'Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration' (2000) 17 *Journal of International Arbitration* 163, 173.

According to Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650, 1688: "while the case for enforcing a nullifying judgment is significantly strengthened if its rationale falls under one of the other defenses under Art V or is otherwise compatible with local law, a judgment is not necessarily contrary to public policy if the grounds appear reasonable and the decision supported. Overall, however, the pro-enforcement policies of international system would tend to favour enforcement of the arbitral award in those circumstances where the foreign judgment does not comport with an Art V ground."

<sup>977</sup> See Jan Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 574, 576.

Some view Paulsson's approach as a 'synthesis between the delocalisation and territorial theories': Andrew and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2005) 444.

Although Paulsson's distinction has attracted criticism and scepticism,<sup>978</sup> there is consensus that New York Convention Art V and Model Law Art 34 'represent an internationally accepted standard' for determining the enforceability and validity of arbitral awards.<sup>979</sup>

For instance, the *European Convention on International Commercial Arbitration* (European Convention 1961)<sup>980</sup> supplements the New York Convention by providing that annulment in a Contracting State 'shall only constitute a ground for refusal of recognition or enforcement' in another Contracting State when such annulment is for the specified reasons. These reasons correspond to New York Convention Arts V(1)(a) to (d) and therefore exclude the public policy exception.<sup>981</sup> The European Convention 1961 also limits the application of New York Convention Art V(1)(e) to annulments which fall within the specified grounds.<sup>982</sup> Consequently, annulment on the basis of public policy does not have extra-territorial effect under the European Convention.<sup>983</sup>

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<sup>978</sup> See, eg Albert Jan van den Berg, 'Enforcement of Annulled Awards?' (1998) 9 *ICC International Court of Arbitration Bulletin* 15, 16; Yasuhei Taniguchi, 'Enforcement in Action: Theoretical and Practical Problems' in Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 589, 592; Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 147ff; Ray Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy' (1999) 17 *Boston University International Law Journal* 141, 194ff.

<sup>979</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 530; Ray Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy' (1999) 17 *Boston University International Law Journal* 141, 189.

<sup>980</sup> *European Convention on International Commercial Arbitration*, 21 April 1961, 484 UNTS 364.

<sup>981</sup> European Convention 1961 Art IX(1).

European Convention 1961 primarily deals with the problems of establishing and operating procedures for disputes arising out of trading agreements between European countries. It does not deal with the recognition and enforcement of arbitral awards: see Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) 546.

<sup>982</sup> European Convention 1961 Art IX(2). This limitation applies to Contracting States 'that are also parties of the New York Convention'.

<sup>983</sup> See, eg, Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999) 73 (citing the Austrian Supreme Court's decision of 20 October 1993, Yearbook ICCA 1995, 1051-1056): "as violation of public policy did not figure in the enumeration of Art IX(2) the setting aside of the present award in its country of origin is not a reason to refuse its enforcement in the country where enforcement is sought."

### 7.3.5 Predictions & recommendations for Australia

To date there is no reported Australian decision enforcing a foreign annulled award.<sup>984</sup> In *John Holland v Toyo Engineering*,<sup>985</sup> the opportunity to consider the annulment exception in New York Convention Art V(1)(e) never arose as the relevant supervisory court refused to set aside the award. The Victorian Supreme Court adjourned the enforcement proceedings in Victoria pending the annulment proceedings in Singapore. Comity was one of the reasons for adjournment, as the Victorian court refrained from considering the merits of the annulment application. The High Court of Singapore subsequently refused to set aside the award because the arbitrator's error of law did not amount to misconduct, and because no particular public policy was identified as having been violated by the award.<sup>986</sup>

Yet Australian courts need to formulate their approach to the enforceability of annulled awards in anticipation of encountering this challenge in the future.

Judicial support for the 'non-merger rule'<sup>987</sup> in Australia does not necessarily mean that Australian courts will adopt the internationalist or delocalisation approach in preference to the territorial approach. Such support nevertheless indicates the judicial willingness to recognise foreign annulled awards as subsisting and potentially enforceable in Australia.

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<sup>984</sup> Andrew Rogers, 'Enforcement of Awards Nullified in the Country of Origin' in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 548.

<sup>985</sup> *Toyo Engineering Corp v John Holland Pty Ltd* [2000] VSC 553.

<sup>986</sup> See *John Holland v Toyo Engineering* [2001] 2 SLR 262.

<sup>987</sup> The 'non-merger rule' means that an award entered into a judgment remains separately enforceable because it is not merged or absorbed into that judgment: see *Brali v Hyundai Corp* (1988) 15 NSWLR 734, 739 (as discussed in Chapter 1 section 1.2.1(c) – 'IAA & FJA').

For an explanation of the territorial and internationalist approaches, see section 7.3.2(b) of this Chapter – 'The competing approaches or theories'.

(a) *Art VII(1) – An unlikely basis for enforcement in Australia?*

It has been suggested that the annulment exception of Art V(1)(e) is a better basis for enforcing annulled awards than the more favourable provision of Art VII(1). This is because the discretionary nature of Art V enables the enforcement court to ‘jointly consider both the award and the foreign judgment, as well as the pertinent interests and policies’, whereas Art VII(1) ‘does not allow for such a balancing of interests’.<sup>988</sup> However, the contrary view is that the enforcement of annulled awards depends on the combined effect of these two articles, since Art V ‘does not supply any discretion to enforce an annulled award independently of national law provisions permitting the court to do so’.<sup>989</sup>

Unlike the *Hilmarton case* and the *Chromalloy case*,<sup>990</sup> Australian courts may not utilise Art VII(1) because Australian arbitration law does not seem to be more favourable to enforcement than the New York Convention. The IAA has adopted both the grounds for non-enforcement in New York Convention Art V and the grounds for annulment in Model Law Art 34.

Furthermore, the application of the CAA through Art VII(1) is unlikely, or is at least unlikely to make any significant difference. The CAA has limited application to foreign awards, except those which fall outside both the New York Convention and the Model Law.<sup>991</sup> While the CAA is silent on the grounds for non-enforcement as it only specifies the grounds for annulment (which are apparently more limited than those of Model Law Art 34), it is not necessarily more pro-arbitration. This is because, firstly, the grounds for annulment in CAA s 42 (ie the arbitrator’s misconduct and improper procurement of arbitration or award) are sufficiently wide to include violations of due process and procedural public policy.

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<sup>988</sup> Stephen Ostrowski and Yuval Shany ‘Chromalloy: United States Law and International Arbitration at the Crossroads’ (1998) 73 *New York University Law Review* 1650, 1681, 1690 and 1693.

<sup>989</sup> Georgios Petrochilos, *Procedural Law in International Arbitration* (2004) 306 (para 7.17) and 336 (para 7.86).

<sup>990</sup> *Hilmarton v Omnium de Traitement et de Valorisation*, Paris Court of Appeal, 19 December 1991, extract in Yearbook Commercial Arbitration (France No. 18) <<http://www.kluwerarbitration.com>> at 27 July 2004; *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia, 1996).

<sup>991</sup> IAA s 12(2).

Secondly, the concurrent application of the CAA and IAA means that the exceptions to enforcement in IAA s 8 (which mirror New York Convention Art V) can be utilised to challenge an application for enforcement under CAA s 33.<sup>992</sup>

It follows that Australian courts may prefer to exercise their discretion under New York Convention Art V(1)(e) if they wish to enforce annulled awards notwithstanding foreign annulment.

**(b) Art V(1)(e) – A more likely but challenging basis for enforcement?**

Article V(1)(e) seemingly presumes an award annulled by the supervisory court to be unenforceable unless the enforcement court renders that award enforceable. The inclusion of annulment as an exception to enforcement presupposes the enforcement court's recognition of the supervisory court's annulment.

The challenge for Australian courts is to define the circumstances under which the foreign annulment judgment should not be recognised, and therefore the foreign annulled award should be enforced. This is part of the challenge in formulating the criteria for exercising the judicial discretion under Art V. There are essentially two questions in this balancing exercise. First, are there any justifications or reasons for refusing recognition of the foreign annulment judgment? If the answer is no, then the foreign annulled award should be denied enforcement. If the answer is yes, then the second question is whether there are nevertheless other justifications or reasons for refusing enforcement of the foreign annulled award. Both questions warrant further discussions.

With respect to the first question concerning the **recognisability of foreign annulment judgment**, Australian courts may utilise the existing exceptions to the recognition and enforcement of foreign judgments under the common law and the *Foreign Judgments Act 1991* (Cth) (FJA), including the following:

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<sup>992</sup> See, eg, *International Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (1995) 128 FLR 458, as discussed in Chapter 1 section 1.2.1(b).



- the foreign judgment was ‘obtained by fraud’;<sup>993</sup>
- the foreign judgment or proceedings lacked due process;<sup>994</sup>
- the foreign judgment (or its enforcement) is contrary to Australian public policy.<sup>995</sup>

The above exceptions to the recognition and enforcement of foreign judgment correspond to the exceptions to the enforcement of foreign awards. The public policy exception already incorporates the fraud exception and the due process exception, at least in the context of foreign awards.<sup>996</sup> Australian case law on the public policy exception to the enforcement of foreign judgments remains scarce and somewhat unsettled. For instance, it is uncertain whether new evidence of fraud is required to re-open a foreign judgment.<sup>997</sup> Furthermore, it is uncertain how much more than differences in the applicable law is required to establish the public policy exception.<sup>998</sup>

Irrespective of whether or not Australian courts will adopt the same approach to the public policy exception to determine the enforceability of both foreign awards and foreign judgments, Australian courts will remain reluctant to invoke public policy to refuse recognition of foreign judgments.<sup>999</sup> This is because any improper or excessive use of this ‘slippery ground’ may expose Australian courts to ‘a most invidious

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<sup>993</sup> FJA s 7(2)(vi).

<sup>994</sup> FJA s 7(2)(v) uses the expression ‘did not...receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear’.

<sup>995</sup> FJA s 7(2)(xi) uses the expression ‘enforcement of the judgment..., would be contrary to public policy’.

For a brief discussion on the Australian cases concerning the public policy exception to the enforcement of foreign judgments, see Chapter 4 section 4.4.1.

<sup>996</sup> See IAA s 19 and its discussions in Chapter 2 section 2.3, Chapter 5 section 5.4.2, and Chapter 6 section 6.5.5.

Similarly, a foreign judgment would be contrary to public policy if it was obtained by fraud, or in violation of due process.

<sup>997</sup> See Chapter 6 section 6.4.6(b) – ‘Predictions & recommendations for Australia’.

<sup>998</sup> See *De Santis v Russo* [2001] QSC 65 and its discussions in Chapter 4 section 4.4.1.

<sup>999</sup> See, eg, *Stern v National Australia Bank* [1999] FCA 1421 and its discussions in Chapter 4 section 4.4.1.

choice’<sup>1000</sup> or ‘unflattering comparisons among legal systems’,<sup>1001</sup> thereby defeating the very purpose of a comity-driven approach.

Paulsson’s distinction between ‘international standard annulment’ and ‘local standard annulment’, imperfect and controversial as it may be, can be of assistance or inspiration for Australian courts. For instance, Australian courts may refuse to recognise a foreign annulment judgment if the ground for that annulment is inconsistent or incompatible with Model Law Art 34. Australian courts may also consider doing so, if the foreign public policy underlying or causing that annulment is contrary to Australian public policy. Yet Australian courts are keen to avoid any comparative evaluation between foreign and Australian public policies.<sup>1002</sup>

There is yet another challenge confronting Australian courts – namely, who should have the onus of proof under Art V(1)(e)? As discussed in Chapter 5,<sup>1003</sup> the enforcement court cannot consider the exceptions in Art V(1) on its own motion. The onus of proof under Art V(1)(e) is nevertheless more complicated than the other exceptions in Art V(1), as it involves proof with respect to the enforceability of both the annulled awards and the annulment judgments. Two alternatives are available.

One interpretation is that Art V(1)(e) presumes foreign annulled awards to be enforceable in Australia (and therefore foreign annulment judgments should not be recognised) unless and until proven to the contrary. This would require the defendant (losing party) to establish the Art V(1)(e) exception to the enforcement of the foreign annulled award by establishing that the foreign annulment judgment should be recognised in Australia. In other words, the onus is on the defendant to rebut the presumption of enforceability of the foreign annulled award by establishing the recognisability of the foreign annulment judgment.

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<sup>1000</sup> Andrew Rogers, ‘Enforcement of Awards Nullified in the Country of Origin’ in Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements & Awards: 40 Years of Application of the New York Convention* (1999) 548, 551.

<sup>1001</sup> Christopher Drahozal, ‘Enforcing Vacated International Arbitration Awards: An Economic Approach’ (2000) 11 *American Review of International Arbitration* 451, 464.

<sup>1002</sup> See, eg, *Attorney-General (United Kingdom) v Heinemann Publishers Australian Pty Ltd* (1988) 165 CLR 30, as discussed in Chapter 3 section 3.3.2 – ‘Challenges arising from the domestic-international dichotomy’.

<sup>1003</sup> See Chapter 5 section 5.3.1 – ‘Art V(1) vs V(2): Parties’ challenge vs Judges’ own motion’.

By contrast, the alternative interpretation of Art V(1)(e) is that foreign annulled awards are prima facie unenforceable in Australia (and therefore foreign annulment judgments should be recognised) unless and until proven to the contrary.<sup>1004</sup> The defendant still bears the initial onus of raising Art V(1)(e) to challenge the enforcement of the annulled award, however the onus then shifts to the claimant (winning party) to establish that the foreign annulment judgment should not be recognised in Australia. This effectively imposes the burden on the claimant to rebut the presumption of unenforceability of the foreign annulled award by establishing an exception to the recognition of the foreign annulment judgment.

The former interpretation appears more in line with the New York Convention's pro-enforcement policy.<sup>1005</sup> The latter interpretation appears more conducive to judicial comity – hence its endorsement by the US courts in the *Baker Marine case* and the *Spier case*.<sup>1006</sup> While the pro-enforcement policy confers presumptive enforceability and even validity on arbitral awards falling within the New York Convention, the presence of Art V(1)(e) nevertheless suggests that such a presumption does not extend to annulled awards.<sup>1007</sup>

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<sup>1004</sup> See Ray Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy' (1999) 17 *Boston University International Law Journal* 141, 213.

<sup>1005</sup> Pierre Lastenouse, 'Why Setting Aside an Arbitral Award is not Enough to Remove it From the International Scene' (1999) 16(2) *Journal of International Arbitration* 25, 46.

<sup>1006</sup> *Baker Marine (Nig.) Ltd v Chervon (Nig.) Ltd*, 191 F 3d 194 (2<sup>nd</sup> Cir, 1999); *Spier v Calzaturificio Tecnica S.p.A.*, 71 F Supp 2d 279 (SDNY 1999).

The US courts in both cases refused to enforce the annulled awards because the relevant parties have shown no adequate reason for refusing to recognise the annulment judgments: see the earlier discussions in section 7.3.1(b) of this Chapter.

<sup>1007</sup> William Park, 'The Specificity of International Arbitration: The Case for FAA Reform' (2003) 36 *Vanderbilt Journal of Transnational Law* 1241, 1274 refers to the 'loss of presumptive validity' under Art V(1)(e) by virtue of annulment.

(c) *Joint application of Arts V(1)(e) & (2)(b)?*

In any event, Australian courts will find it appropriate in most cases to consider the second question of the **enforceability of a foreign annulled award**. This is because the balancing exercise inherent in the discretionary nature of Art V(1)(e) entails an examination of both the foreign annulment judgment and the foreign annulled award. The non-recognition of the foreign annulment judgment does not automatically lead to the enforcement of the foreign annulled award.

Consider the hypothetical situation in which Art V(1)(e) only is raised to challenge the enforcement of a foreign annulled award in Australia. After reaching a decision against the recognition of the foreign annulment judgment, the Australian enforcement court may nevertheless refuse to enforce the award for public policy reasons. Here the basis for non-enforcement is the public policy exception of Art V(2)(b) rather than the annulment exception of Art V(1)(e). The enforcement of the award would be contrary to Australian public policy, irrespective of whether that award's annulment should be recognised in Australia. Such *ex officio* consideration of the public policy exception is less pro-enforcement, yet more cautious and preventive of injustice.

On the other hand, it is also possible, albeit unusual, to use Art V(2)(b) as an additional ground for refusing enforcement of annulled awards. For instance, some countries may have a public policy against the enforcement of annulled awards, or of awards which are invalid or otherwise unenforceable in their supervisory States. In light of the controversies surrounding New York Convention Arts V and VII, as well as the never-ending debate on the enforceability of annulled awards, one may argue that Art V(1)(e) represents a transnational public policy (or at least international public policy) against the enforcement of annulled awards. This somewhat radical or tenuous interpretation is yet another example of the overlapping categories of international public policy and transnational public policy. While Australian courts may not adopt such an interpretation, they may nevertheless be reluctant to exercise their discretion in favour of enforcement where Art V(1)(e) has been established.

Another possible situation for refusing enforcement under both Arts V(1)(e) and (2)(b) is where the foreign public policy which annulled the award, or the foreign court's public policy ground for annulment, substantially corresponds to an Australian public policy. In other words, if Australian courts would also set aside the same award on the

basis of public policy if it were the supervisory court of that award. After all, public policy is a ground for both annulment and non-enforcement of arbitral awards. This leads to the following recommendations:

- If the ground for the foreign annulment is violation of the supervisory State's public policy,<sup>1008</sup> then the Australian enforcement court may still enforce the foreign annulled award, unless it would also regard that award (or the enforcement of that award) as contrary to an Australian public policy. This is because public policy differs from country to country, and the applicable public policy in this context is Australian public policy.
- A similar approach also applies if the ground for the foreign annulment is lack of arbitrability under the law of the supervisory State,<sup>1009</sup> at least to the extent of the overlap between the public policy exception and the arbitrability exception to enforcement.
- By contrast, if the ground for the foreign annulment is based on, or analogous to, any of the grounds in Art V(1) or Model Law Art 34(2)(a), then the Australian court should not enforce the foreign annulled award, unless there are strong justifications for enforcement. This is because the annulled award's violation of any of these internationally recognised standards is likely to render the enforcement of that award contrary to an Australian public policy. The grounds for non-enforcement in Art V(1) or Model Law Art 34(2)(a) represent the public policies against awards which arise from invalid arbitration agreements (because of parties' incapacity, for instance);<sup>1010</sup> or which arise from proceedings in violation of due process<sup>1011</sup> or the applicable law;<sup>1012</sup> or which contravene their arbitration agreements or exceed the scope of their arbitrators' jurisdiction.<sup>1013</sup>

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<sup>1008</sup> Such a ground for annulment is permissible under Art V(2)(b) and Model Law Art 34(2)(b)(ii).

<sup>1009</sup> Such a ground for annulment is permissible under Art V(2)(a) and Model Law Art 34(2)(b)(i).

<sup>1010</sup> New York Convention Art V(1)(a) and Model Law Art 34(a)(i).

<sup>1011</sup> New York Convention Art V(1)(b) and Model Law Art 34(a)(ii).

<sup>1012</sup> New York Convention Art V(1)(d) and Model Law Art 34(a)(iv).

<sup>1013</sup> New York Convention Art V(1)(c) and Model Law Art 34(a)(iii).

## 7.4 CONCLUSIONS

This Chapter has explored two annulment-related implications arising from New York Convention Art V(1)(e). This first is that the New York Convention leaves the annulment of arbitral awards to the domestic law of 'the country in which, or under the law of which' the awards were made. This raises the question of whether Australian courts should unify or vary their approaches to the public policy ground for non-enforcement in Art V, Model Law Art 36 and IAA s 8(7), and the public policy ground for annulment in Model Law Art 34.

The second implication is that an award's annulment may not prevent its enforcement elsewhere. This raises the question of how should Australian courts determine the enforceability of foreign annulled awards under the annulment exception of Art V(1)(e), the public policy exception of Art V(2)(b), and the more favourable provision of Art VII(1).

The interaction between these two implications of Art V(1)(e) is both illuminating and challenging. Whether or not Australian courts would adopt a different approach to the application of public policy in the context of annulment may depend on their views as to the extra-territorial effect of annulment. While Model Law 34 seeks to harmonise the grounds for annulment, New York Convention Art VII(1) nevertheless enables the importation of domestic laws to enforce annulled awards. Moreover, the paradoxes, compromises and inadequacies of the New York Convention require Australian courts to balance competing public policies.

### 7.4.1 Harmonising judicial approaches to public policy in enforcement & annulment proceedings

The different treatments of the arbitrator's disregard or error of law by the US and Indian courts illustrate the different views on the question of whether the judicial approach to the public policy exception should be the same for both enforcement and annulment proceedings. In spite of the 'conceptual and jurisdictional differences' between annulment and non-enforcement,<sup>1014</sup> Australian courts are encouraged to consider adopting the same (or at least similar) approach to the public policy ground for

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<sup>1014</sup> Ray Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy' (1999) 17 *Boston University International Law Journal* 141, 158.

non-enforcement in New York Convention Art V, IAA s 8(7) and Model Law Art 36, as well as the public policy ground for annulment in Model Law Art 34. This is because all of these provisions apply to ‘foreign awards’ (ie awards with foreign elements), even though different categories of foreign awards may be subject to different regulatory regimes. Like the imprecise distinction between international and domestic public policies, the distinction between foreign and domestic award is not clear-cut.

A uniform approach does not necessarily lead to uniform outcomes. At stage one of applying the public policy exception, the scope of the public policy exception may vary because not all public policies apply to all types of foreign awards, irrespective of the different views on the distinction between domestic and international public policies. At stage two, the threshold or likelihood of establishing the public policy exception may vary because the subject matter or cause of the alleged public policy violation is either the award itself (in the context of annulment), or the enforcement of that award (in the context of non-enforcement). Finally, the courts may be influenced by the different consequences of annulment and non-enforcement when exercising their discretion at stage three. This is in spite of the ongoing debate on the extra-territorial effect of annulment.

#### **7.4.2 Harmonising judicial approaches to determining the enforceability of annulled awards**

It is both inevitable and desirable that foreign awards are subject to dual judicial control. Yet this raises public policy questions concerning the extent to which the enforcement court should defer or give effect to the supervisory court’s annulment; or conversely, to the supervisory court’s refusal to annul an award.<sup>1015</sup> It has been suggested that:

“If it is permissible to disregard the decision of the courts of the seat to hold the award valid, why should it be necessary to abide by their decision in the converse situation, namely when the said courts have set aside the award? International harmony is not more important in one situation than in the other, symmetrical one.”<sup>1016</sup>

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<sup>1015</sup> Section 7.3 of this Chapter examines the former question – ie if the supervisory court has set aside an award, should the enforcement court also refuse to enforce that award? Section 6.5.4 of Chapter 6 examines the latter question – ie if the supervisory court has refused to set aside an award, should the enforcement court also enforce that award?

<sup>1016</sup> Pierre Mayer, ‘Revisiting *Hilmarton* and *Chromalloy*’ in Albert Jan van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (2001) 165, 171.

The New York Convention does not prohibit the enforcement of annulled awards, even though such enforcement has been regarded as a ‘malfunctioning’,<sup>1017</sup> which creates ‘an uneasy feeling’,<sup>1018</sup> and is ‘undoubtedly beyond any agreement to arbitrate’.<sup>1019</sup> The Australian courts need to either formulate their own approach or choose between the competing approaches to determining the enforceability of foreign annulled awards.

Both the French approach and the *Chromalloy* approach rely on New York Convention Art VII(1) – that is, an annulled award is enforceable if it satisfies the enforcement State’s domestic or local standards for enforcement which are more favourable than those of the New York Convention. The *Chromalloy* approach is nevertheless more sophisticated (and unfortunately more controversial), as it also considers whether the foreign annulment contravenes the parties’ agreement or the enforcement State’s public policy.

In Australia, the more favourable provision of Art VII(1) is arguably a less suitable basis for enforcing foreign annulled awards. Australia does not have arbitration laws that are more pro-enforcement than the New York Convention. Furthermore, the tension between the apparently mandatory Art VII and the discretionary Art V remains unresolved. The joint pursuit of greater enforceability and uniformity is another paradox or conundrum posed by the New York Convention.

Thus the annulment exception of Art V(1)(e) is the recommended basis for enforcing annulled awards. This approach is based on the discretionary nature of Art V and the interests of comity, which allows the enforcement of foreign annulled awards only if the relevant foreign annulment judgments should not be recognised. All of the three apparently conflicting US cases (ie *Chromalloy*, *Baker Marine* and *Spier*)<sup>1020</sup> have been supportive of, or at least influenced by, this approach.

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<sup>1017</sup> Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (2002) 9.

<sup>1018</sup> Richard Mosk and Ryan Nelson, ‘The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions’ (2001) 18 *Journal of International Arbitration* 463, 474.

<sup>1019</sup> Philipp Wahl, ‘The Chromalloy Case Revisited’ (1999) 16 *Journal of International Arbitration* 131, 138.

<sup>1020</sup> *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, 939 F Supp 907 (District Court of Columbia, 1996); *Baker Marine (Nig.) Ltd v Chervon (Nig.) Ltd*, 191 F 3d 194 (2<sup>nd</sup> Cir, 1999); *Spier v Calzaturificio Tecnica S.p.A.*, 71 F Supp 2d 279 (SDNY 1999).



Delimiting the circumstances for exercising the judicial discretion under Art V(1)(e) is a balancing exercise with multiple challenges. Firstly, there may be conflict between the enforcement of foreign annulled awards and the recognition of foreign annulment judgments. Secondly, the question concerning the onus of proof remains unsettled, if not unexplored. For instance, is an annulled award *prima facie* unenforceable or enforceable under Art V(1)(e)? Thirdly, there are competing views on the extent to which the enforcement court can consider and evaluate the supervisory court's grounds for annulment. For instance, whether such inquiry should be confined to internationally recognised standards, or be extended to the enforcement court's local standards.

On the other hand, when determining the enforceability of annulled awards, Australian courts should consider the circumstances for applying Art V(2)(b) additionally to, or independently of, Art V(1)(e). Awards which are set aside under any of the grounds comparable to those in Art V(1) or Model Law Art 34(2)(a) are *prima facie* defective or unjust in some way. Hence their enforcement is likely to cause injustice and violate Australian public policy.

It is hoped that Recommendation 10 will provide a useful starting point for the Australian judiciary.

***Recommendation 10: Relevance or significance of foreign judgment on annulment or enforcement***

- (a) The supervisory court's decision against annulment or non-enforcement of an award neither precludes the relevant party from relying on the public policy exception in the enforcement proceedings, nor obliges the enforcement court to enforce that award.
- (b) The supervisory court's annulment of an award would, as a general rule, lead to the enforcement court's refusal to enforce that award under the annulment exception (ie IAA s 8(5)(f), New York Convention Art V(1)(e) or Model Law Art 36(1)(a)(v)). The enforcement court may consider: (i) any applicable exceptions to the recognition or enforcement of the supervisory court's annulment judgment; and (ii) the reasons for the supervisory court's annulment.

- (c) With respect to Recommendation 10(b)(i), if there is an applicable exception to the recognition or enforcement of the supervisory court's annulment judgment (for examples, fraud, due process or public policy violation), then subject to Recommendation 10(b)(ii), the enforcement court may allow enforcement notwithstanding the applicability of the annulment exception.
- (d) With respect to Recommendation 10(b)(ii), if the reason for annulment derives from, or corresponds to, any of the grounds in New York Convention Art V(1) or Model Law Art 34(2), then the enforcement court may refuse enforcement under the annulment exception and even the public policy exception.

### 7.4.3 Chasing the unruly horse of public policy?

The interaction between enforcement and annulment of arbitral awards may, but need not be, akin to chasing the unruly horse. When deciding whether to harmonise or differentiate their approach to the public policy exception in enforcement and annulment proceedings, and when determining the enforceability of annulled awards, Australian courts need to ensure that there are 'necessary safeguards to correct mistakes and abuses committed by arbitrators',<sup>1021</sup> as well as by any judges involved. In this regard, any incidental or necessary merits review of the awards or annulment judgments would be justifiable, and should therefore be permissible. Neither the annulment nor the enforcement of an award should cause injustice, since neither the public policy exception nor the pro-enforcement policy of the New York Convention condones arbitral or judicial injustice.

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<sup>1021</sup> Kenneth Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 *Texas International Law Journal* 43, 79.

## CHAPTER 8

### TAMING THE UNRULY HORSE

“Faith in this system of international arbitration largely explains the higher rate of voluntary compliance with arbitral awards and the extremely low rate of vacatur and non-enforcement in situations where awards are not automatically observed. Nonetheless, the risk of non-enforcement remains looming like a ‘Sword of Damocles’ over the entire system, and the costs of non-enforcement, even when rare, are enormous for the parties, the arbitrators, the institutions, the States and the system as a whole.”<sup>1022</sup>

Consistency in the judicial application of the public policy exception to the enforcement of arbitral awards is essential for maintaining and strengthening faith in arbitration. Almost two centuries since Burrough J’s infamous ‘unruly horse’ metaphor,<sup>1023</sup> public policy is no longer ‘never argued at all’ when opposing the enforcement of arbitral awards. The unruly horse of public policy continues its gallop through the judicial enforcement of arbitral awards, causing inconsistencies and even leading some judges from sound law. In light of Lord Denning’s insistence that ‘the unruly horse can be kept in control’,<sup>1024</sup> together with the ILA’s finding that the public policy exception ‘has not given rise to any serious mischief’,<sup>1025</sup> the challenge for the Australian judiciary is how to ‘ride this unruly horse better’.<sup>1026</sup>

#### The problems & their sources

This thesis has explored the main controversies and complexities in the application of the public policy exception by using real case studies and hypothetical scenarios. The New York Convention’s three paradoxes or conundrums are the primary source of these controversies and complexities.

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<sup>1022</sup> Gunther Horvath, ‘The Duty of the Tribunal to Render an Enforceable Award’ (2001) 18 *Journal of International Arbitration* 135, 135.

<sup>1023</sup> *Richardson v Mellish* [1824-34] All ER 258, 266.

<sup>1024</sup> *Enderby Town Football Club Ltd v The Football Association Limited* [1971] Ch 591, 606.

<sup>1025</sup> ILA Final Report 265.

<sup>1026</sup> Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration* (2003) 432.

The first is the public policy paradox – namely, both the public policy exception and the pro-enforcement policy are paradoxically public policies themselves. The New York Convention leaves the national courts to balance between the apparently competing pro-enforcement policy and the public policy exception, as it is silent on which of these public policies should have priority.

The second is the public policy exception to the principle against merits review – namely, the New York Convention apparently and paradoxically envisages merits review under the public policy exception.<sup>1027</sup> In any event, it is extremely difficult for the national courts to avoid reviewing the merits of awards when applying the public policy exception.

The third is the possible conflict arising from the joint pursuit of ‘greater enforceability of arbitral awards and greater uniformity of enforcement practice’.<sup>1028</sup> Since the primary goal of the New York Convention is the facilitation, rather than the harmonisation, of the enforcement of arbitral awards, it leaves the national courts to annul and even enforce awards under their own laws. Nor does the New York Convention provide for the division between supervisory and enforcement jurisdiction.

Judicial disagreement and bewilderment as a result of these three paradoxes or conundrums of the New York Convention unfortunately create further controversies and complexities surrounding the public policy exception. For instance, undue deference to the pro-enforcement policy may undermine the utility of the public policy exception. Absolute avoidance of merits review may preclude due consideration of the merits of claims under the public policy exception. Furthermore, an award which has been annulled under the supervisory State’s domestic law may be enforced under the enforcement State’s more favourable domestic law. Judicial application of the public policy exception and implementation of the pro-enforcement policy are by no means harmonious or consistent.

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<sup>1027</sup> Homayoon Arfazadeh, ‘In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception’ (2002) 13 *American Review of International Arbitration* 43, 44.

<sup>1028</sup> Stephen Ostrowski and Yuval Shany ‘Chromalloy: United States Law and International Arbitration at the Crossroads’ (1998) 73 *New York University Law Review* 1650, 1656.

## The lessons & recommendations

Inspired by the ILA Resolution and the wealth of literature and case law, this thesis has attempted to tame the unruly horse by presenting recommendations tailor-made for the Australian judiciary.<sup>1029</sup> These recommendations derive from an in-depth analysis of the so-called narrow approach to the public policy exception, including the various dimensions, rationales, and potential problems of that approach. They recommend when and how the Australian judiciary may need to depart from the narrow approach in order to prevent an unruly or unjust application of the public policy exception.

### *Alternative perception of the New York Convention's public policy paradox*

The recommendations in this thesis are premised on an alternative perception of the New York Convention's public policy paradox – that is, both the public policy exception and the pro-enforcement policy serve the ultimate and overriding purpose of preventing and sanctioning injustice. Neither enforcement nor non-enforcement of an award should cause or condone injustice. In this sense, there is no public policy paradox in the New York Convention. The public policy exception and the pro-enforcement policy are not incompatible public policies. The public policy exception is an exception to the pro-enforcement policy in the sense of rejecting awards which are unjust or otherwise unworthy of enforcement.

This alternative perception seeks to promote judicial clarity and consistency in carrying out the various balancing exercises at all stages of applying the public policy exception. It reminds the Australian courts that their decisions on the following issues should not cause or condone injustice. Nor should their approach to these issues render the public policy exception even more unruly.

- (a) Whether to inquire beyond the public policies of Australia when determining whether the alleged public policy falls within the public policy exception – for instance, whether to consider transnational public policies or other countries' public policies (see Recommendation 1).

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<sup>1029</sup> For ease of reference, these recommendations are reproduced at this end of this Chapter.

- (b) Whether to reopen or inquire into the arbitral decision on the alleged public policy violation, or decline to do so because of waiver or estoppel (see Recommendation 3).
- (c) Whether to admit evidence of the alleged public policy violation, or exclude such evidence on the basis of waiver or estoppel (see Recommendation 4).
- (d) Whether to consider the public policy exception on their own motion before proceeding to enforce an award (see Recommendations 5(c) and 8).
- (e) Whether to allow enforcement of an award notwithstanding the party's establishment or the court's finding of the public policy violation (see Recommendations 6 and 7).
- (f) Whether to sever the offending part of an award and thereby enforce the non-offending remainder of that award (see Recommendation 9).
- (g) Whether to defer to the supervisory court's decision on an award's validity or enforceability by allowing or refusing that award's enforcement accordingly (see Recommendation 10).
- (h) Whether to enforce a foreign annulled award, or refuse to do so in recognition of the foreign annulment judgment (see Recommendation 10).
- (i) Whether to unify or vary their approaches to the public policy exception in various contexts, including the enforcement and annulment of arbitral awards, and even the enforcement of foreign judgments.

***Alternative approach to delimiting the scope of the public policy exception***

When determining whether or not the alleged public policy falls within the public policy exception (at stage one of applying the public policy exception), the Australian enforcement court needs to balance the pro-enforcement policy with the importance of the alleged public policy, such as the culpability of the conduct sanctioned by the alleged public policy.

The recommended alternative approach to delimiting the scope of the public policy exception in Recommendation 1 seeks to promote neutrality, clarity and consistency in terminology, without compromising the inherent relativity, diversity and flexibility of public policy. It confines the public policy exception to 'mandatory rules of public

policy’ instead of the ILA’s concept of ‘international public policy’. This is because the domestic-international dichotomy remains underdeveloped in Australia, understandably because it may be futile to distinguish between these overlapping categories of public policy. Using the common denominators of public policy and mandatory rules, the term ‘mandatory rules of public policy’ encapsulates the elements of fundamentality, sufficient connection and extra-territoriality.<sup>1030</sup> It enables the consideration (and even the application) of transnational public policies or other countries’ public policies in appropriate circumstances, rather than confining the public policy exception to the enforcement State’s public policies.

The definition of ‘mandatory rules of public policy’ in Recommendation 1(b) caters for the substance-procedural distinction. The phrase ‘arbitral award, proceedings or dispute’ conveys that the public policy exception encompasses the subject matter of the arbitral dispute, the conduct of the arbitral proceedings, and the contents of the arbitral award.

#### ***Merits review under the public policy exception***

Determining the extent of the judicial inquiry for the purposes of applying the public policy exception at stage two involves another delicate balancing act – namely, whether the alleged public policy violation is sufficiently serious to outweigh the pro-enforcement policy, specifically the public policy of upholding arbitral finality. This is analogous to the principle of proportionality (the status of which remains unsettled in Australia), since the extent of the judicial inquiry should not be disproportionate to the seriousness of the alleged public policy violation.

Recommendation 3(c) partially adopts ILA Resolution Rec 3(c) by acknowledging the need for merits review. The Australian enforcement court may need to look behind or beyond an award to examine whether and how the arbitrator considered the alleged public policy violation. The enforcement court should be entitled to an independent determination of whether or not the underlying contract, the award, and therefore the enforcement of that award, would be contrary to an applicable public policy.

Australian courts need to find and maintain an appropriate balance between, on the one hand, excessive or intrusive scrutiny which unduly prolongs the arbitral process; and on the other hand, cursory or inadequate review which overlooks arbitral injustice.

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<sup>1030</sup> ILA Resolution Rec 2(b) also acknowledges these elements.

Recommendations 3 and 4 offer assistance in this regard. They caution the Australian courts against employing the principles of waiver or estoppel, particularly if the alleged public policy indeed falls within the public policy exception. They also recommend deference to an arbitral decision with caution, particularly if such decision has been improperly rendered.

On the other hand, this thesis has also made recommendations on issues not addressed in the ILA Resolution, some of which are pending in UNCITRAL's future work.<sup>1031</sup> These include the interaction between, and therefore the concurrent application of, the public policy exception and other exceptions to enforcement (notably the due process exception, the arbitrability exception, and the annulment exception); the criteria for discretionary enforcement notwithstanding the applicability of the public policy exception; the circumstances for *ex officio* consideration of the public policy exception; and certain annulment-related public policy issues. It is hoped that these recommendations will provide a useful reference point for debating and resolving these issues in the near future.

***Restraint on discretionary enforcement notwithstanding the public policy violation***

The final stage of applying the public policy exception is yet another balancing exercise. It determines whether there are countervailing circumstances which tip the balance in favour of enforcement notwithstanding the establishment of the public policy exception. This essentially weighs the pro-enforcement policy against the consequences of enforcement. It also resembles, or is capable of incorporating, the proportionality principle, since the refusal to enforce an award should not be disproportionate to the seriousness of the public policy violation resulting from that award's enforcement.

Accordingly, Recommendations 6 and 7 suggest a cautious exercise of the judicial discretion in favour of enforcement under the public policy exception. Australian courts should require compelling justifications for enforcement, such as waiver or estoppel by virtue of the relevant party's unjustifiable or unreasonable conduct.

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<sup>1031</sup> After holding a special commemoration of the New York Convention's 40<sup>th</sup> anniversary in June 1998, the UNCITRAL Working Group on Arbitration has adopted several topics for its future work. See *Note by the Secretariat – Possible Future Work in the Area of International Commercial Arbitration*, UN GA, 32<sup>nd</sup> session, UN Doc A/CN.9/460 (6 April 1999); *Report of the Working Group on Arbitration on the Work of its 32<sup>nd</sup> Session*, UN GA, 33<sup>rd</sup> session, UN Doc A/CN.9/468 (10 April 2000).



With respect to the controversies surrounding the judicial discretion to refuse enforcement beyond the prescribed exceptions to enforcement (which are generally regarded as exhaustive or exclusive), the correctness of *Resort Condominiums International Inc v Bolwell*<sup>1032</sup> on this issue, and any implications arising from the omission of the word ‘only’ in s 8(5) of the *International Arbitration Act 1974* (which is present in New York Convention Art V(1)), await consideration by the Australian High Court.

### ***Support for ex officio consideration of public policy***

Until then, any textual discrepancies between the IAA and New York Convention seemingly suggest a more proactive and vigorous approach for Australia, meaning that Australian courts may invoke the public policy exception more readily in appropriate circumstances, and that they may refuse more readily the enforcement of awards which fall within the public policy exception.

Recommendation 8 cautions Australian courts against refraining from considering the public policy exception *ex officio*, especially when such restraint may risk injustice. Australian courts may invoke the public policy exception when the relevant party raises other exception to enforcement without raising the public policy exception, especially in light of the overlap between the various exceptions to enforcement. For instance, Recommendation 5 provides for a joint consideration of the public policy exception and the due process exception.

### ***Relevance or significance of foreign judgment on annulment or enforcement***

Recommendation 10 suggests that a foreign supervisory court’s decision against annulment or non-enforcement of an award does not necessarily justify an Australian court’s enforcement of that award. By the same token, the supervisory court’s annulment or non-enforcement of an award does not necessarily justify the Australian court’s non-enforcement of that award. This is because the Australian enforcement court needs to undertake an independent assessment of whether it should refuse or allow enforcement under the public policy exception.

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<sup>1032</sup> *Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406.

It remains to be seen whether and how UNCITRAL will settle the persisting debate on the enforceability of annulled awards. This is perhaps one of the most difficult legal problems facing international commercial arbitration, for it arises from, or at least involves, all three of the New York Convention's paradoxes or conundrums. There is an apparent tension between the enforcement of foreign annulled award (in deference to arbitrator's decision) and the recognition of foreign annulment judgment (in deference to supervisory court's decision). There is potential for applying the annulment exception in conjunction with the public policy exception. Merits review is unavoidable, if not justifiable. Furthermore, whether or not the New York Convention intends (or even requires) an award's enforcement under the enforcement State's more favourable domestic law in preference to that award's non-enforcement under its own provisions, remains contentious.

Recommendation 10 encourages the Australian judiciary to participate in this challenging debate by considering both the recognisability of foreign annulment judgments and the enforceability of foreign annulled awards. Just as a foreign judgment will not be recognised in Australia if it is contrary to an Australian public policy, the enforcement of an annulled award in contravention of an Australian public policy will also be disallowed, irrespective of whether or not that award's annulment should be recognised in Australia.

It is hoped that the Australian High Court will pursue the opportunity to harmonise or streamline its application of public policy in the enforcement and annulment of arbitral awards, as well as in the enforcement of foreign judgments. This will require a fine balance between simplicity and rigidity, between flexibility and uncertainty, and between feasibility and desirability.

Public policy, and its application, need not be an unruly horse. In any event, the unruly horse can, and must, 'come down on the side of justice'.<sup>1033</sup>

Farewell, the unruly horse of public policy!

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<sup>1033</sup> *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, 607 (Lord Denning MR).

## RECOMMENDATIONS FOR THE AUSTRALIAN JUDICIARY

### *Recommendation 1: Scope of the public policy exception*

- (a) The term ‘public policy’ in the public policy exception (ie IAA s 8(7)(b), New York Convention Art V(2)(b), and Model Law Art 36(1)(b)(ii)) means ‘mandatory rules of public policy’.
- (b) ‘Mandatory rules of public policy’ are rules intended to encompass the arbitral award, proceedings or dispute under consideration, as expressed or embodied in the enforcement State’s statutory and case law, as well as in the international instruments and customs adopted or otherwise recognised by the enforcement State.
- (c) In the interests of consistency and convenience, IAA s 19 (which deems certain conduct to be contrary to Australian public policy for the purposes of the public policy exceptions in Model Law Arts 34 and 36) should extend to the public policy exception in IAA s 8(7)(b) and New York Convention Art V(2)(b).

### *Recommendation 2: Enforceability of awards based on illegal contracts*

- (a) The award must be tainted or otherwise affected by the illegality of its underlying contract, such that its enforcement would be contrary to the applicable mandatory rules of public policy.
- (b) Accordingly, an award may be unenforceable in Australia if: (i) Australia is either the place of performance or the place of the proper law; (ii) the underlying contract is illegal and therefore unenforceable in Australia; and (iii) the award purports to enforce this illegal contract (for instance, by compelling, rewarding, or otherwise condoning the performance of the illegal contract).

***Recommendation 3: Judicial inquiry into the arbitral decision***

- (a) As a general rule, new evidence of public policy violation is required for judicial reopening or further inquiry into the relevant parts of the arbitral finding. In other words, the relevant party is estopped from adducing the same evidence before the enforcement court.
- (b) However, the enforcement court may waive such requirement (and thereby disallow the other party's claim for estoppel) in the interests of justice or other justifiable circumstances.
- (c) Such justifiable circumstances include the arbitrator's lack of jurisdiction to determine the relevant issues, and the arbitrator's lack of good faith or due process in determining the relevant issues.
- (d) In this regard, the enforcement court may reassess the relevant facts or issues if the alleged public policy violation cannot be determined by a mere review of the award.

***Recommendation 4: Admissibility of evidence of alleged public policy violation***

- (a) If the relevant party did not present evidence of the alleged public policy violation during the arbitral proceedings, the enforcement court may consider whether such party has waived or forfeited the right to present such evidence in the enforcement proceedings.
- (b) Such evidence may be admissible if it was not available or reasonably obtainable at the time of the arbitral proceedings, and if it is likely to have a material effect on the outcome of the arbitral proceedings.

***Recommendation 5: Public policy exception & due process exception***

- (a) Where the relevant party raises the due process exception (ie IAA s 8(5)(c), New York Convention Art V(1)(b) or Model Law Art 36(1)(a)(ii)) together with the public policy exception (ie IAA s 8(7)(b), New York Convention Art V(2)(b) or Model Law Art 36(1)(b)(ii)), the enforcement court may refuse enforcement under either or both of these exceptions. The enforcement court may do so if: (i) the award contravenes any due process requirements of the law governing the arbitral procedure, or any mandatory rules of public policy; and (ii) such contravention has a material effect on the outcome of the arbitration.
- (b) Where the relevant party raises the due process exception without raising the public policy exception, the enforcement court may consider the public policy exception *ex officio* when determining whether or not to enforce the award.
- (c) A party's failure to raise due process violation before the enforcement proceedings should not preclude that party's subsequent reliance on the public policy exception in the enforcement proceedings, at least where the alleged public policy violation is not solely based on the alleged due process violation.

***Recommendation 6: Discretionary enforcement – the general rule***

If the enforcement court finds, either upon the party's proof or its own motion, that to enforce the award would be contrary to mandatory rules of public policy, then it should refuse to enforce the award unless such refusal would cause substantial injustice.

***Recommendation 7: Discretionary enforcement – waiver or estoppel as an exception to the general rule***

- (a) The enforcement court should refrain from allowing enforcement of the award on the basis of waiver or estoppel, unless the relevant party's failure to raise the alleged public policy violation before the arbitrator is unjustifiable or unreasonable.
- (b) The relevant party's mere failure to challenge the arbitral award in the supervisory State (or any other country) may not justify the discretionary enforcement of the award notwithstanding the public policy exception.

***Recommendation 8: Ex officio consideration of public policy***

The enforcement court may, in appropriate circumstances, consider whether the enforcement of an award would be contrary to mandatory rules of public policy on its own motion. Such circumstances include the following:

- (a) The enforcement proceedings are uncontested.
- (b) The arbitrability exception (ie IAA s 8(7)(a), New York Convention Art V(2)(a) or Model Law Art 36(1)(b)(i)) is raised by the relevant party or by the enforcement court *ex officio*.
- (c) The due process exception (ie IAA s 8(5)(c), New York Convention Art V(1)(b) or Model Law Art 36(1)(a)(ii)) is raised by the relevant party. (See also Recommendation 5.)
- (d) The relevant party raises the annulment exception (ie IAA s 8(5)(f), New York Convention Art V(1)(e) or Model Law Art 36(1)(a)(v)), or submits that the award has been set aside or refused enforcement elsewhere. (See also Recommendation 10.)

***Recommendation 9: Partial enforcement of arbitral award***

If the enforcement of only a part of an award would contravene mandatory rules of public policy (ie the ‘offending part’), then the enforcement court may enforce the remainder of the award (ie the ‘non-offending part’), provided that: (i) the offending part is severable from the non-offending part; and (ii) such partial enforcement would not cause any substantial injustice.

***Recommendation 10: Relevance or significance of foreign judgment on annulment or enforcement***

- (a) The supervisory court's decision against annulment or non-enforcement of an award neither precludes the relevant party from relying on the public policy exception in the enforcement proceedings, nor obliges the enforcement court to enforce that award.
- (b) The supervisory court's annulment of an award would, as a general rule, lead to the enforcement court's refusal to enforce that award under the annulment exception (ie IAA s 8(5)(f), New York Convention Art V(1)(e) or Model Law Art 36(1)(a)(v)). The enforcement court may consider: (i) any applicable exceptions to the recognition or enforcement of the supervisory court's annulment judgment; and (ii) the reasons for the supervisory court's annulment.
- (c) With respect to Recommendation 10(b)(i), if there is an applicable exception to the recognition or enforcement of the supervisory court's annulment judgment (for examples, fraud, due process or public policy violation), then subject to Recommendation 10(b)(ii), the enforcement court may allow enforcement notwithstanding the applicability of the annulment exception.
- (d) With respect to Recommendation 10(b)(ii), if the reason for annulment derives from, or corresponds to, any of the grounds in New York Convention Art V(1) or Model Law Art 34(2), then the enforcement court may refuse enforcement under the annulment exception and even the public policy exception.